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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

By OCTAVIUS PICKERING,

COUNSELLOR AT LAW.

VOLUME VI.

SECOND EDITION.

WITH NOTES AND REFERENCES

BY J. C. PERKINS.

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LITTLE, BROWN, AND COMPANY.
1864.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THIS VOLUME OF REPORTS

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. MARCUS MORTON,
} JUSTICES

ATTORNEY-GENERAL.
HON. PEREZ MORTON.

SOLICITOR-GENERAL.
HON. DANIEL DAVIS.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF ESSEX, NOVEMBER TERM 1827, AT SALEM.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON,

The Inhabitants of NEWBURY *versus* The Inhabitants of HARVARD.

Where a stranger was received and entertained by an inhabitant of a town, previous to April 10, 1767, and his residence there was designedly concealed, so that the town officers had no opportunity to warn him to depart, it was *held*, that he did not gain a settlement.

ASSUMPSIT for expenses incurred in the support of Elizabeth Foss, a pauper.

At the trial, before *Putnam* J., it was proved, that the pauper was a granddaughter of Shadrach Ireland, a teacher of certain peculiar doctrines in religion, and derived her settlement from him. He fled from Charlestown in 1760, to Harvard, to avoid a prosecution for blasphemy, and lived there in great

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Newbury v. Harvard.

privacy till 1780, when he died there.* His wife and four children remained at Charlestown.

It appeared from depositions in the case, that Ireland, upon going to Harvard, lived for ten or twelve years at the house of Samuel Cooper, who was one of his followers. The house was in a retired place, no public or private road leading to it or very near it, and the land about it not being cleared. The nearest neighbours were a widow and her two daughters, who lived a quarter of a mile to the north, and Isaac Willard, another follower, who with his family lived half a mile to the south. Ireland occupied a chamber in Cooper's house. A string, connected with a clapper, passed through the floor into the room occupied by the family, and when any person approached the house, the string was pulled to give him notice to keep in his chamber; and when a daughter of one of his followers, after he had lived with Cooper eight or nine years, told his name to a daughter of Cooper, it was with
3 an injunction of secrecy. He had likewise a place in the barn to which he occasionally retired, to be in still greater privacy. He was not called by his proper name, but the elder persons in the family called him "brother," and the children "uncle," or "uncle Jewett"; and sometimes he was called "the

* The following extracts from Backus's Church History of New England, were made a part of the case. "And near the close of the year 1749, a number of people in Easton and Norton made so high a profession of being led into believer's baptism, that no ordained minister in the land would do to administer it to them. But they met by a place of water, and one would baptize another, and then he the next; so that about twenty persons were dipped, by four or five administrators among themselves. Parting from their lawful wives and husbands, and taking of others, immediately followed, until some bastard children were born among them, with many other abominations." p. 209. "Another essential truth of the gospel is, that we must daily deny ourselves and take up our cross, or we cannot be Christ's disciples; but this truth has often been held in unrighteousness in every age. The people mentioned p. 209, run to a great length in that way. A man from Charlestown, near Boston, was at their head, who about 1758, assumed God's essential prerogatives in such a blasphemous manner, that he was complained of to authority, upon which he fled, and his followers concealed him for many years, and a house was built for that purpose in Harvard, where they privately resorted to him, who declared himself to be perfect and immortal, until death arrested him, and he was buried with great secrecy. Since which the same house in Harvard has been made the head-quarters of a small company from Britain, who have a woman for their head." p. 409. *Reporter*

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man." Sometime after he had resided there, a back lean-to was erected, in which he worked at his business of a cabinet-maker, and a cellar was dug under it and connected by stairs with his chamber, so that he could go down unobserved when he pleased. He never ate with the family, but alone in his chamber, where his food was carried to him. When he happened to be out of the house, and any stranger was there, some one of the family was sent to tell him, in order that he might come in privately. He often went to Willard's, but always in the evening, and upon approaching the house he made a signal, upon which some one would go out to him, and if none but members of the family were in the house, he would go in. His followers, from six to ten in number, used to visit him, and he would converse with them and exhort them. There was no formality in these meetings. They began soon after he went to Harvard. About three families of his followers, and who were such before he left Charlestown, lived in Harvard; others who visited him were from Grafton, Cambridge, Hollis, Littleton, and some other places. A woman by the name of Burt was one of his hearers, in opposition to the wishes of her husband, who was an inhabitant of Harvard. After Ireland had resided in Harvard ten or twelve years, he purchased of Willard a parcel of land, on which his followers built him a house, called the "square house," and there he resided during the remainder of his life, still keeping his true name a secret, and seeing no persons except his followers.

A verdict was taken for the plaintiffs; and if Ireland had such a residence as the law required, to gain a settlement in Harvard, prior to April 10, 1767, (the date of *Prov. St.* 7 *Geo.* 3, *c.* 3.) judgment was to be rendered upon the verdict; but if not, the plaintiffs were to become nonsuit.

Pickering and *Hind*, for the defendants, contended that this concealed residence did not come within the meaning of *Prov. St.* 12 and 13 *Will.* 3, *c.* 10, § 3, under which a person might gain a settlement by a residence in a town for twelve months, unless warned to leave the town. The selectmen of Harvard were guilty of no laches in not warning Ireland. The concealment of his residence there was a gross fraud upon

Nov. 1827

4

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Newbury v. Harvard.

them. Further, his domicile continued in Charlestown. *Hardwick* v. *Raynham*, 14 Mass. R. 363; *Chelsea* v. *Malden*, 4 Mass. R. 134; *Great Barrington* v. *Lancaster*, 14 Mass. R. 256, 257; 1 Bl. Com. 363; Com. Dig. *Justices of Peace*, *B* 72; *The King* v. *St. Michael's*, 2 Doug. 630; *Claverack* v. *Hudson*, 15 Johns. R. 283; *White* v. *Bailey*, 3 Mass. R. 271; *First Mass. Turnp. Corp.* v. *Field*, ibid. 201; *Fowler* v. *Hunt*, 10 Johns. R. 465.

Gerrish, for the plaintiffs, referred to Anc. Charters, &c., 173, 251, 364, 508, and he contended, that it was to be inferred from *Prov. St.* 10 *Geo.* 2, *c.* 3, (Anc. Chart. &c. 508,) that a residence, though secret, would give a settlement, as the town had a remedy against the inhabitant who should entertain a person not an inhabitant. But Ireland's residence was not a secret. It was known to several inhabitants, and among them to Burt, who was not one of his followers, and who might have given notice to the selectmen. If a writ against the town had been served on Cooper or Willard, the service would have been sufficient, (*St.* 1785, *c.* 76, § 8,) and with equal reason their knowledge of Ireland's residence should be deemed notice to the town.

Nov. 10*th.* *Per Curiam.* It appears that Ireland lived in Harvard long enough to gain a settlement, but the defence is, that he fled from Charlestown, being indicted for blasphemy, and went to Harvard as a place of concealment, and used means to keep himself concealed, being known to be there, by his true name, by only some few followers, on whom secrecy was enjoined in regard to his dwellingplace. The law provided a method by which the inhabitants of a town might avoid becoming liable for the support of a stranger, who should make it the place of his residence, and an opportunity ought to be afforded them to pursue the course prescribed. If a person should conceal himself in a cave, like some of king Charles's judges, the town, being ignorant of it, could not warn him to depart, and ought not to be charged for his support. It is objected, on the part of the plaintiffs, that every inhabitant of a town, who entertained a stranger, was bound to disclose to the selectmen or town clerk the fact that such person had come there to reside, and this under a penalty of forty shillings, besides being

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liable to answer all charges which might arise in the town by entertaining him. The argument struck us as being of some force; we think, however, upon consideration, that the statute applies to the common cases, where no concealment is attempted. There the penalty might induce an inhabitant to make a disclosure to the town officers, or they might themselves discover that a stranger had taken up his residence among them. But in the case before us, there was an actual concealment by inhabitants, from motives stronger than their duty under the law. We are all of opinion that the verdict should be set aside.

Plaintiffs nonsuit.

MICAH FAVOUR *versus* JONATHAN B. SARGENT.

To a plea of disclaimer, in a writ of entry, the demandant replied, that at the time of the purchase of the writ, the tenant claimed to have title by virtue of a deed from a collector of taxes; and upon special demurrer, because it was not alleged that the tenant ever had possession, the replication was adjudged bad, and the tenant recovered costs.

Writ of entry. Plea in bar, that the tenant has nothing and at the time of the purchase of the demandant's writ had nothing, nor any time before or since had any thing in the demanded premises, or in any part thereof, nor claims any title or interest in the same, but wholly disclaims all right, title, &c. Replication, that a parish collector of taxes made a deed of the demanded premises to the tenant, in pursuance of a sale for an alleged non-payment of taxes assessed thereon, and that the tenant, before and on the day of the purchase of the writ, claimed to have title by virtue of the deed. Special demurrer, because the replication does not allege, that the tenant ever had possession of the demanded premises, and because it does not traverse or in any way deny the facts alleged in the plea.

Nov. 10th

6

Minot, in support of the demurrer, relied on *St.* 1795, *c.* 75, § 2; he cited also *Prescott* v. *Hutchinson*, 13 Mass. R. 439.

Varnum and *How*, *contrà*, said that the tenant had such a possession as was contemplated by the statute, and the demandant was obliged to bring the action, for in two years the

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Favour v. Sargent.

deed would have become indefeasible; (St. 1785, c. 70, § 7;) the demandant therefore must recover costs.

But the *Court* were clear that the replication was bad, and that the tenant, of course, was entitled to costs.

John Manning *et al. versus* The Inhabitants of the Fifth Parish in Gloucester.

Some of the inhabitants of a parish in the town of G. being universalists and members of an independent society in another part of the town, it was voted, at a parish meeting in 1802, that the independent society build a meetinghouse, according to their town valuation, with the parish, and use it in the same proportion. The house was built accordingly, and the societies apportioned the time in which each should occupy it; and for two years it was occupied agreeably to such apportionment; afterwards the independent society were excluded. The house was built on land granted by the commoners of the town in 1724, "to P, T and B, and the rest of the neighborhood, &c. for the use of a school for ever;" and this land was for more than 40 years in the exclusive possession of the parish. An instrument, signed and sealed by the members of the independent society who had joined in building the meetinghouse, containing the terms of the agreement, as the plaintiffs alleged, and which they said had been accepted by a vote of the parish in 1802, was offered to the parish in 1805 for their acceptance, but was rejected. In 1821 the plaintiffs, (two only of whom were subscribers to the written agreement,) with other persons, formed themselves into a separate universalist society. Upon a bill in equity against the parish to compel them to perform the written agreement, it was *held*; —

That parol evidence was inadmissible, to prove that this agreement had been acceded to by the parish, no vote to that effect appearing on the parish records: —

That the suit could not be sustained by the plaintiffs for the benefit of themselves and others of the universalist society, as it did not appear that they were successors or legal representatives of the independent society, nor for the benefit of the plaintiffs as subscribers of the agreement, as all of them were not subscribers: —

7 That if the agreement were considered as an executory contract not involving a trust, a specific performance could not be decreed under St. 1817, c. 87, as the contract was made before the passing of the statute; and if considered as involving a trust, the trust did not arise under a deed, the vote of the parish not being a deed, nor equivalent to a deed, and so was not within the equity jurisdiction given by that statute to this Court in regard to trusts: —

That if the grant of the commoners was by a deed of trust, the trust could not be enforced under this bill, in which the trust set forth was not alleged to spring from that grant: —

That if the persons named in the grant took jointly or in common with those in the neighborhood, the plaintiffs, upon showing a title under the grant, would hold in common with individuals, and not with the parish in its corporate capacity: —

And that the parties were not tenants in common of the meetinghouse, because it was built at their joint expense and for their common benefit, but that it belonged to the parish alone, they having the title to the land.

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THIS was a bill in equity brought by John Manning, Aaron Pool and William Norwood, all of Gloucester, on behalf of themselves and of all others, being inhabitants of Sandy Bay (part of Gloucester) and belonging to the religious society of universalists, otherwise heretofore called members of the Independent Society in Gloucester, and parties to the covenant hereafter mentioned, and their heirs. The bill alleges, that heretofore, as set forth in the covenant, purporting to be dated on the 20th of August, 1802, the plaintiffs, having been requested by the inhabitants of the fifth parish to join them in building a house for public worship, presented the covenant to a meeting, called an *inhabitants' meeting*, held by the fifth parish and others, inhabitants of Sandy Bay, being the plaintiffs in this suit, convened by the authority of the fifth parish, and that the covenant was accepted by the parish; that the plaintiffs did by the covenant, under their seals, covenant and agree with the inhabitants of the parish, that they would bind themselves and their heirs for the building and finishing of the meetinghouse, in concurrence with the inhabitants of the parish, in manner following, *viz.* that after the sales of the pews, if the proceeds should be insufficient to defray the expense of building, they would pay their proportion of the deficiency, to be ascertained by the town valuation of 1803, by a joint committee to be appointed by the parties for that purpose, or if there should be a surplus, that it should be distributed between the parties in the like proportion; and that the meetinghouse should be used by the parties respectively in the same proportion, to be ascertained by a joint committee of both societies; and that upon the proportion's being ascertained to the acceptance of a majority of their committee or committees respectively, it should thereupon be accepted by the inhabitants, and such proportion should be recorded on their parish book, and should be mutually binding on both parties; that such apportionment should continue in force for seven years, and at the end of every seven years there should be chosen a joint committee of the parties to determine the proportion anew, according to the town valuation of every seventh year; and that every new appointment should be binding on the parties for seven years, the committee having first noted

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their doings in writing and delivered a copy to each of the parties. The plaintiffs further aver, that this covenant was adopted by the parish, and that in pursuance of the provisions therein contained, the plaintiffs and the parish built the meetinghouse, and thereupon became owners and tenants in common of the same, and by themselves and their pastors occupied the same alternately, from the time of the dedication thereof on the 12th of September, 1804, for the space of two years; that on the 3d of January, 1805, pursuant to the covenant, a joint committee was chosen, who made an apportionment, such as to give to the parish the use of the meetinghouse for thirty-one Sundays in a year and to the plaintiffs twenty-one, and this apportionment was noted in writing by the committee and a copy delivered by them to the plaintiffs, and an other copy to the defendants, to be accepted and recorded in their parish book; that pursuant to this apportionment, the plaintiffs used the meetinghouse until the 9th of February, 1807, when they were debarred the use of it by the parish; that at that time there was in the hands of their common treasurer for building the meetinghouse, the sum of 1600 dollars, which, together with the proceeds of the sale of 14 pews then remaining unsold, the parish have since taken, without accounting to the plaintiffs for their proportion thereof. The plaintiffs further aver, that in 1811 they appointed a committee to meet any committee that might be chosen by the parish, for the purpose of apportioning the meetinghouse, and that the committee made application to the parish to be permitted to use the meetinghouse pursuant to the covenant and agreement before mentioned; that the application was renewed in 1821; and that in 1824 they made application for the same purpose, and also for their proportion of the surplus money above mentioned, and for compensation for being debarred the use of the meetinghouse; all which the parish refused. The plaintiffs pray for a decree of specific performance of the agreemen between the parties. They also allege, that the defendants, by their doings, have made themselves trustees in the premises to the use and benefit of the plaintiffs jointly with themselves in the proportion stated. and pray for a performance of the trust.

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The defendants answer, that they did not enter into such covenants and agreements with the plaintiffs, then members of the Independent Society, as are set forth in the bill; that the supposed covenant and agreement, alleged by the plaintiffs to have been signed and sealed on their part, was not delivered to the defendants, and was not accepted by them, and was not recorded on the parish records; that the plaintiffs and defendants did not build the meetinghouse and thereupon become owners and tenants in common thereof, and did not use the same in common alternately for two years, as alleged; that no apportionment of the meetinghouse was made by a joint committee for that purpose duly chosen and authorized; that they are not bound to account to the plaintiffs for the proceeds of the pews, but they say that the whole proceeds have long since been applied for the payment of the expense of building and completing the meetinghouse; that they did not grant the separate use of the meetinghouse to the plaintiffs upon their several applications, nor appoint committees to apportion the same, because the meetinghouse was built upon land of the parish, and has always belonged to the parish, and the plaintiffs have had no right or interest therein, except what belonged to such of them as owned pews; that they have never been trustees in the premises, for the use and benefit of the plaintiffs in any manner; that the supposed covenant and agreement purports to have been executed by thirty-six persons, (who are named, including two only of the three plaintiffs,) and that after the date thereof and before this suit was commenced, thirteen of them (naming them) became members of the parish by joining the religious society thereof, five of them (naming them) removed from the bounds of the parish, and sixteen of them (naming them) died; that it was provided by the supposed covenant and agreement, that the persons who signed and sealed it should meet together annually for the choice of certain officers and the transaction of other business, and that such meetings have not been held; that those persons did not become a separate religious society for the support of public worship, but continued to be members of the Independent Society; and that if the plaintiffs ever had any cause of com-

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plaint against the defendants, it is barred by the statute of limitations.

It was agreed by the parties, that all the inhabitants of the territory of the fifth parish, otherwise called *Sandy Bay*, *the cape*, and *the head of the cape*, were formerly members of the first parish in Gloucester, and that on the 1st of January, 1754, they were incorporated as a distinct parish. Before their incorporation, to wit, in 1752, they voted to build a meetinghouse, and they accordingly did build one. It was taken down and sold in 1804, and the proceeds distributed among the several owners of the pews. Ebenezer Cleaveland was ordained minister of the parish in 1755, and on his own request was dismissed in 1779. From that time there was no settled minister in Sandy Bay, until October, 1805, when the present minister of the parish was ordained.

From 1774 there has been in Gloucester a society of universalists. It was known by the name of the Universalist Independent Society, and was incorporated June 28, 1792, by the name of the Independent Christian Church. In 1788 divers inhabitants of the fifth parish had joined themselves to this society. These members met occasionally, as they had preaching, at the old meetinghouse, and elsewhere within the fifth parish. The others of their denomination used to meet at the *harbor*, so called, in the first parish, five miles from the old meetinghouse. The society had there a meetinghouse, owned by individuals, and a settled minister.

11 There were no other denominations of christians in Sandy Bay, until 1805. After that time there were baptists; who were incorporated in 1811.

From 1787 the warrants for meetings are recorded, "to the freeholders and all qualified voters of the fifth parish."

At a meeting March 25, 1788, it was voted to repair the meetinghouse, the parish committee to attend to the business of repairing. It was also voted, that the Independent Society have the meetinghouse every fourth Lord's day the current year for their use, by paying one fourth part of the costs of reparation. A vote similar to this last was passed in April, 1792, and in June following it was voted, "that the Independent Society have the meetinghouse one fourth part of the

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time to preach in, as long as they shall repair one quarter part."

The inhabitants of the territory of the fifth parish, from their incorporation in 1754 until the building of the new meetinghouse in 1804, acted in the name of the fifth parish in or of Sandy Bay, as a school district, and managed their school concerns by the parish officers until 1787. Then they divided themselves into three wards for that year, and chose a committee of two for each ward, without regard to religious denominations. In 1790, at a meeting respecting schools, a member of the universalist society was chosen moderator; and in 1792, two of that society were added to the parish committee to regulate schools and lay out the money. In 1796 it was voted to build a schoolhouse "on the parish land." The expression in the warrant is, "the land that belongs to the parish for that purpose." It was also voted, that the parish committee, with four other persons (three of whom were universalists), should be a committee for building the schoolhouse. These votes, however, were not carried into effect. In 1797 it was voted, that any number of persons should have liberty to build a proprietors' schoolhouse on the parish land; and that the school committee, with the parish committee, lay out a convenient lot for the same. This school committee consisted partly of universalists. The committee set off a part of the land to the proprietors of the new schoolhouse; which was built in shares by individuals of both societies.

The remaining part of the land above mentioned, on which the new meetinghouse was afterwards built, was the remaining front of an acre of land granted by the commoners of Gloucester, January 26, 1725, "to John Pool, John Tarr, Jabez Barker, and the rest of the neighborhood at the head of the cape, for the use of a school for ever," &c. This grant and the location, and the gift, in 1765, of the reversion, in case of a forfeiture, to Rev. E. Cleaveland, are all that is to be found in the records of the commoners respecting this land. It appears by the parish records, that in 1780 it was voted, that the parish committee take care of the school land. In subsequent years there were votes requiring the parish committee to lease the land, fence it, &c. In 1807 it was voted,

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that the Rev. Mr. Jewett have the improvement of the parish land for the current year. A similar vote was passed every year until 1813, when it was voted, that he "should have the improvement of the parish land so long as he continues to supply the desk in this house."

At a meeting of the fifth parish, April 26, 1802, it was voted "to build a meetinghouse the current year." A committee of five, two of whom were universalists, was chosen to build the meetinghouse. It was also voted that the committee warn all the inhabitants to meet at the adjournment.

Pursuant to the above vote a warrant was issued, to warn "the freeholders and other inhabitants of both societies in the fifth parish." A meeting was held May 11, 1802, when it was voted "to record the word *inhabitants* for the word *parish* that is used in the warrant;" and "that the inhabitants will build the meetinghouse on the land belonging to the inhabitants, adjoining to the new schoolhouse land in Sandy Bay." The meeting was adjourned to May 25, when it was voted, "that the Independent Society build the new meetinghouse according to their town valuation, with the other society called the fifth parish in Gloucester;" — "to build and improve the house according to the town valuation;" — "to take the valuation by the town valuation and in the year 1803." The building committee were directed to proceed in the execution
3 of the work. They purchased materials in 1802, 1803, &c. and hired money on their own credit, and built and completed the house.

On the 4th of July, 1804, pursuant to a warrant issued by the parish committee, to warn "the freeholders and other inhabitants of both societies in Sandy Bay," a meeting was held, at which a committee of five (who were members of both societies) was chosen to appraise the pews before the time of sale. It was voted, "that the pews be set up at the appraisal and struck off to him who shall offer the most money above the appraisal, being an inhabitant of Sandy Bay." Three persons, two of them universalists, were chosen a committee to sell the pews and give conveyances of the same. At an adjourned meeting, July 9th, F. Norwood jun. was chosen treasurer to receive the moneys arising from the sale of pews.

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The 19th of July was appointed for the sale. The sum of the appraisals was 8871 dollars, the estimated cost of the house. The amount received by the treasurer for the pews sold was 9009 dollars. Of 121 pews sold in 1804, 50 were bought by universalists. In 1807 the defendants sold the rest of the pews (16 in number), appraised at 1135 dollars in the whole, at a small advance above the appraisal. The bell and clock now in the meetinghouse were purchased by the defendants with part of the money thence received.

On the 1st of February, 1805, a warrant was issued to warn the freeholders and other inhabitants of the fifth parish qualified to vote in town meetings, "first, to see if said parish will accept *in toto* a certain instrument containing articles of agreements entered into by certain individuals of the Christian Independent Society, relative to their building and improving the new meetinghouse with said parish, and record the same on the parish book. Secondly, to know if said parish will accept the report of the joint committees of the fifth parish and of the proprietors of the Independent Christian Society, in which they have agreed on the proportion of time each society is entitled to improve respectively the new meetinghouse." On the 18th of February the parish voted not to accept of this instrument, nor of the report of this joint committee.

At a parish meeting, March 7, 1805, it was voted, "that 14
the parish committee agree with the committee of the Independent Society, and know how each society is to improve their proportion of time, and make report at the adjournment." The record of the adjourned meeting, March 25, states, "that the committee did not make any return of their doings as respects the Independent Society." On the 17th of March, 1806, the parish voted, "that the parish committee notify the committee of the Independent Society to meet with them, and at such meeting of the two committees said parish committee allow said Independent Society to improve the meetinghouse in proportion to what said society owns in said house, the current year." The committees had a conference, and the universalists rejected the proposition.

On the 5th of February, 1807, the parish voted, "that the

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parish committee keep the keys of the meetinghouse in their possession, and not deliver them to any person or persons whatever, nor open the house unless it be for public worship, or to transact parish concerns in;" and the parish officers have governed themselves by that vote to the present time.

The new meetinghouse was dedicated in September, 1804, and for about two years was used two Sundays in five by members of the Christian Independent Society. There was no settled minister at Sandy Bay in 1802 and 1803, and a universalist minister has never been settled there.

The universalists appointed committees for apportioning the meetinghouse, and made demands for the use of it, as stated in the bill.

Since the year 1803 some inhabitants of the parish have joined or returned to the universalist society in Gloucester, others have become members of the baptist society, and some universalists have returned to the parish society.

The parish committees called the parish meetings and the inhabitants' meetings respecting the meetinghouse, &c. after the first meeting in 1802, which was called on a justice's warrant. The records of all the meetings before referred to were made by the parish clerk.

The support of public worship in Gloucester has been by
15 taxes on polls and estates, or voluntary; never by assessments on the pews, or shares in the houses of public worship.

The universalists who were proprietors of the meetinghouse, have held meetings as set forth in their records, beginning February 17, 1804, but the defendants objected that these records were not admissible in evidence. It appeared from them, that such universalists met at different times from February 17, 1804, to February 25, 1811, (once, in 1805, in the meetinghouse,) and took measures for procuring an apportionment of the meetinghouse.

On the 26th of February, 1821, a number of persons met at the house of Manning (one of the plaintiffs), for the purpose of forming a religious society, and chose a committee to draft a constitution. They met by adjournment on the 2d of March, when the constitution was reported and accepted, and again on the 9th of March, when they chose a clerk, treasu-

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rer, and committee; also a committee to give notice to the Christian Independent Society in Gloucester of the establishment of the Universalist Benevolent Society, and to request the Christian Independent Society to discharge Aaron Poole and others. They have met every year since, and chosen officers for the year. In the constitution they recite, "that being in part the remainder of that portion of the Christian Independent Society of Gloucester, who heretofore, in the year 1802, formed ourselves into a body, by joining as pro prietors toward building a house of public worship, &c. with and by the request of the fifth parish, &c. and other members who have since joined us, considering the distance we are from said Christian Independent Society's meetinghouse at the harbour, so called, and presuming on the free consent of the said society that we should separate therefrom and become a society of ourselves, — and in order to improve what property we may have in common with said fifth parish in said meetinghouse in Sandy Bay, and other conveniences and appurtenances there, — we do hereby engage to conform to such rules," &c.

The cause was argued by *Pickering* and *Manning*, for the plaintiffs, and *Saltonstall* and *Cummins*, for the defendants. *Nov. 6th.*

Manning offered depositions to show that the covenant in question was prepared previously to the meeting of May 25, 1802, and was the foundation of the votes then passed. 16

Saltonstall said, that if the covenant had been then offered and accepted by the parish, it would have appeared on their records, and parol evidence to supply or contradict the records was inadmissible.

Pickering replied, that the question was not between corporators themselves; the plaintiffs are strangers. The defendants are trustees, and their records cannot be conclusive against the *cestui que trusts*. He cited *Canal Bridge* v. *Gordon*, 1 Pick 304; [see 2nd ed. note 1;] *Bangs* v. *Snow*, 1 Mass R. 181

Per Curiam. We think that in a suit of this kind, a deficiency in the parish records is not to be supplied by the testimony of the inhabitants. *Taylor* v. *Henry*, 2 Pick. 402. If a vote is omitted, the application should be for process to *Nov. 7th.*

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compel the clerk to amend his records.[1] This is our present opinion; but we can revise it, should it become necessary.

An argument was then had upon the case as it stood without these depositions.

April term 1828.

WILDE J. delivered the opinion of the Court. This case, although incumbered with many facts, depends principally on the covenant or agreement set out in the bill, and the proceedings of the defendants in relation to that agreement.

It is alleged in the bill, that in the year 1802 an agreemen was entered into between the defendants and divers inhabitants of Sandy Bay, who were then members of a society called the Independent Society of Gloucester, for the purpose of erecting a house for public worship, to be held and used by them as tenants in common, for their mutual convenience and benefit, according to the terms of the agreement, which are particularly set forth in the bill. The defendants deny that they ever became a party to this agreement; and it appears, that at a legal meeting of the inhabitants of the parish on the 18th day of February, 1805, the same was rejected by a vote of the parish. But the plaintiffs contend, that the parish was bound by their previous acts and votes, and consequently that the vote of February 1805 was inoperative.*

17 The agreement bears date the 20th of August, 1802, and was probably signed about that time. At a previous parish meeting, held on the 25th of May, 1802, it was voted, that the Independent Society build the new meetinghouse according to their town valuation, with the other society called the Fifth Parish of Gloucester. It was also voted to build and improve the house according to the town valuation. The meetinghouse was accordingly built and completed in the year following, and the pews were disposed of, in pursuance of a vote of the parish, among the subscribers of the agreement, and the other members of the two societies. Committees also were appointed by those societies to apportion the time in which each should use and occupy the meetinghouse, according to the stipulations contained in the agreement. And for two years

[1] See *Hartwell* v. *Littleton*, 13 Pick. 229.

On this point the counsel for the plaintiffs cited *Rehoboth* v. *Hunt*, 1 Pick. 225. *Reporter*

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the house was occupied according to the apportionment made by the committees.

The plaintiffs contend, that these votes and proceedings of the parish amount in law to an acceptance of the agreement.

So far as the terms of the agreement and the votes of the parish coincide, the parish is certainly bound, and thus far the plaintiffs are entitled to relief, provided the Court has jurisdiction of the case, and the present parties are the parties to the original contract, or their legal representatives.*

The plaintiffs claim in behalf of themselves and the other members of the Universalist Benevolent Society, so called, but it does not appear that they are the successors or legal representatives of the Independent Society for whose benefit the contract was made. The bill therefore cannot be sustained for the benefit of the Universalist Benevolent Society. Nor can the plaintiffs maintain their suit as subscribers to the agreement, because some of them are not subscribers, and have no interest in the contract. But as these objections may be removed by amending the bill, or by filing a new one, it seems 18
proper that we should decide the question of jurisdiction, so as to prevent, as far as may be, further controversy.

If we consider the agreement as an executory contract not involving a trust, it is clear that we have no authority to decree a specific performance. The statute of 1817, c. 87, expressly limits the jurisdiction of the Court to contracts made subsequently to the passing of the act. And if the agreement might be considered as involving a trust to be performed by the defendants, still it was a trust arising under a parol contract, and not under a deed, and so is not within the equity jurisdiction of the Court.†[1] The vote of the parish is neither a deed nor equivalent to a deed; nor does it appear that the grant from

* To show that the plaintiffs were proper parties, their counsel cited *Lloyd* v. *Loaring*, 6 Ves. jun. 773; *Cockburn* v. *Thompson*, 16 Ves. jun. 321; *Scots Char. Soc.* v. *Shaw*, 8 Mass. R. 532. — For the defendants was cited *Baptist Association* v. *Hart's Executors*, 4 Wheat. 1. *Reporter.*

† On this point the counsel for the defendants cited *Goodwin* v. *Hubbard*, 15 Mass. R. 217; *Runey* v. *Edmands*, ibid. 294; *Flint* v. *Sheldon*, 13 Mass. R. 443. *Reporter.*

[1] See *Smith* v. *Lane*, 3 Pick. (2nd ed.) 207, note 1.

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the commoners of Gloucester was by deed. If however it were by a deed of trust, the trust could not be enforced against the defendants, who are not the trustees, and do not hold the estate under that grant. It is true that all persons coming into possession of a trust estate, with notice of the trust, are bound to perform the trust.[a] But as this bill is framed, no such question can be raised. The trust, as set forth in the bill, is alleged to spring from the agreement between the subscribers and the parish. If any trust had been created by the grant of the commoners of Gloucester, the trust should be set out in the bill, with suitable averments; and then the questions might arise, whether the grant were by deed, within the meaning of the statute of 1817; whether the parish had notice of the trust; and other questions which it is unnecessary to particularize. At present, nothing appears in the facts stated which can give us jurisdiction under the statute of 1817.

The remaining question to be considered is, whether we have jurisdiction under the statute of 1823, *c.* 140, which provides that this Court may hear and determine in equity all disputes between co-partners, joint-tenants, and tenants in common. * The plaintiffs' counsel contend that the parties are tenants in common of the meetinghouse, but from the facts admitted the title to the land on which it was erected appears to be in the parish. It is agreed that for more than forty years the parish has been in the open, exclusive, and undisturbed possession of the lot in question, which possession alone is a sufficient title.

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But if we look into the original title, we find it equally clear that the parties are not tenants in common. The grant of the commoners of Gloucester in 1724, was to "John Pool, John Tarr, Jabez Barker, and the rest of the neighbourhood at the head of the cape, for the use of a school for ever."

If under this grant the persons named took an estate in trust for the use of the neighbourhood, as the plaintiffs' counsel

[a] See 2 Story's Comm. Eq. 502, 503; 1 Story's Comm. Eq. 384; *Safford* v. *Rantoul*, 12 Pick. 233.

* The defendants' counsel cited *Wilkin* v. *Wilkin*, 1 Johns. Ch. R. 111; *Phelps* v. *Green*, 3 Johns. Ch. R. 302; *Donovan* v. *Finn*, 1 Hopk 59; *Walton* v. *Law*, 6 Ves. jun. 150. *Reporter.*

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have argued, then the parish in its corporate capacity has no title under the grant, either legal or equitable. The trustees took the legal estate, and the other inhabitants of the neighbourhood were the *cestui que trusts*. And if the persons named in the grant took jointly or in common with the inhabitants not named, the parties do not hold the estate in common, for the plaintiffs have shown no title under the grantees; and if they had, they would hold in common with other individuals, and not with the parish.

But the plaintiffs' counsel contend, that the parties are tenants in common of the meetinghouse, if not of the land, because it was built at their joint expense, and for their common benefit. But in determining the question, whether the parties are tenants in common, we must look at the legal title, which is clearly in the parish. The portion of the expenses contributed by the subscribers of the agreement and the Independent Society, towards the building of the meetinghouse, gave them no legal title in the property. These expenses were advanced in pursuance of an agreement made, or supposed to be made, with the parish, which however cannot be construed into a grant of any right or title in the building. Nor have the plaintiffs acquired any title by occupation, for this was under a vote of the parish for a limited time, which has long since expired.

The only remedy the plaintiffs have is at law on the contract, or an implied assumpsit for the expenses; and this remedy is still open for them, if not lost by lapse of time.* It may be an inadequate remedy, and no doubt this is a proper case for a court of equity; but without more ample jurisdiction, it is impossible for us to grant relief in equity.[1] 20

Bill dismissed with costs.

* In regard to the statute of limitations, the defendants' counsel cited 1 Mad. Ch. Pract 73; 2 Mad. Ch. Pract. 244; *Stackhouse* v. *Barnston*, 10 Ves jun. 466; *Hovenden* v. *Annesley*, 2 Sch. & Lefr. 630. *Reporter.*

[1] See Revised Stat. *c.* 81, § 8

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The Inhabitants of DANVERS *versus* THE COMMISSIONERS OF HIGHWAYS for the County of ESSEX

Where the damages occasioned by laying out a road were estimated by a committee, and their report was accepted by the Court of Sessions, but the road was not worked before the *St.* 1825, *c.* 171, took effect, it was *held*, that the commissioners appointed under that statute having determined to construct the road, it was their duty to estimate the damages anew, in order that they might be paid by the county.

It was *held* also, that by *St.* 1827, *c.* 77, (repealing the former statute,) the authority of the Commissioners over such road continued until it should be finally and conclusively acted upon by them.

AT the term of this Court held in Middlesex in October, 1827, the inhabitants of the town of Danvers presented a petition, in which they state, that in obedience to the order of the Court of Sessions for the county of Essex, a committee located a certain new road in Danvers and made return of their doings at the April term, 1826, of that court, together with their estimate of the damages occasioned to the several proprietors of land over which it passed, which return was then accepted by that court, and the town was ordered to make and finish the road in fifteen months from that time, and to pay the damages estimated as above mentioned; and that no part of the road was made or worked on the 1st of July, 1826; that in September following the commissioners of highways took
21 supervision and review of the road, and have since proceeded in the construction and working of the same; that the commissioners, though requested, have made no estimate of the damages occasioned to the several proprietors of the land, but that the damages which the Court of Sessions ordered to be paid, are still existing demands against the town: — and the petitioners pray for a rule to the commissioners, to show cause why a mandamus should not issue from this Court, commanding them to complete the supervision and review of the road and to make an estimate of the damages occasioned thereby, and to certify the same to the Court of Sessions.

A rule was granted accordingly; and at this term the commissioners, in showing cause, stated that the estimate of damages by the committee, being accepted by the Court of Ses

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sions before July 1, 1826, was obligatory on the town, and all damages sustained by individuals were by law due from the town, and the commissioners had not legal authority to assess or re-assess the same. They further stated, that they had contracted for working and finishing the road.

Saltonstall and *Gerrish* insisted, that the commissioners had no authority to re-assess the damages. A debt had become due to the owner of the land from the town; it was a vested right, and an attempt by the legislature to make one corporation liable for the debt of another, would be unconstitutional. The intention of *St.* 1825, *c.* 171, in relation to roads located but not worked, is merely that the commissioners shall complete what the Court of Sessions have left unfinished. Suppose the town had paid the damages assessed, must the county pay them over again upon a re-assessment?

Proctor, for the petitioners, cited *Gedney* v. *Tewksbury*, 3 Mass. R. 310.

The opinion of the Court was drawn up in the vacation, by

PARKER C. J. A rule to show cause having issued previous to the last term, on which the commissioners made a return, showing their reasons for not proceeding to the estimate of damages due to individual owners of land through which the several roads were laid out, the chief reason being that the subject matter had been acted upon under authority of the Court of Sessions, before the passing of the statute which transferred the jurisdiction over highways to the commissioners, the return was adjudged insufficient, because by *St.* 1825, *c.* 171, § 5, it is enacted, that the several counties shall pay the damages sustained by any person or corporation in their real estate by laying out, &c. any highway, and in the same section it is provided, that all roads laid out but not worked at the time this act takes effect, shall be subjected to the supervision and review of the commissioners, and the commissioners shall have all the powers, and the counties shall be subjected to all the liabilities, in reference to such roads, as are provided for new roads by this act.

It is stated in the petition, and not contradicted in the return of the commissioners, that the road mentioned in the petition, though laid out before the passing of that statute,

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Danvers v. Commissioners of Highways of Essex

was not worked. So that the jurisdiction of the Court of Sessions over it was transferred to the commissioners, and it became their duty, in order that the damages might be paid by the county, as is required by the statute, to estimate the damages anew, and certify the same, as is prescribed. The statute above referred to having been repealed, and the powers of the commissioners having been transferred to a new tribunal not yet constituted, it became necessary to ascertain whether there was any provision for cases pending under the repealed statute; and we find there is the most full and explicit provision for a continuance of authority in the commissioners appointed under the repealed statute, in regard to all cases relating to roads which had not been finally and conclusively acted upon by them. *St.* 1827, *c.* 77. We are to treat the commissioners then, in the same manner as if the last statute had not passed; and they having shown no sufficient cause for neglecting to estimate the damages, a peremptory mandamus must issue, to enforce the execution of their duty as set forth in the proceedings in this case.[1]

[1] See *Boxford* v. *County Commissioners of Essex County*, 7 Pick. 337 *Springfield* v. *County Commissioners of Hampden*, 10 Pick. 59.

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The Salem Mill Dam Corporation *versus* Joseph Ropes.

Where by an act creating a corporation for the purpose of erecting mill dams, it was provided that the capital stock should be divided into 5000 shares, not exceeding 100 dollars each, and that after 1000 shares should be subscribed for, a meeting of the proprietors might be called, at which any acts might be done "for the purpose of organizing the corporation, and arranging its affairs," it was *held*, that no legal assessment could be made for the general objects of the act of incorporation until all the shares should have been subscribed for; but that an assessment laid to defray preliminary expenses incurred in obtaining the act of incorporation and ascertaining the practicability and utility of the enterprise, would be valid.

Held also, that the subscribers were *personally* liable for such assessment, they having, after the passing of the act of incorporation, signed an agreement to pay all such legal assessments as should be made after the corporation should be organized according to the act.

This was an action of *assumpsit* upon the following agreement, subscribed by the defendant and others, in April, 1826, *viz.* "Whereas it is proposed to establish manufactures in Salem, and with a view to that object an act of incorporation has been obtained, entitled An Act to incorporate the Salem Mill Dam Corporation, — we, the subscribers, severally agree o take the number of shares of the capital stock in said corporation which are affixed to our respective names, and to pay all such legal assessments on each of said shares as shall be made by the future government of said corporation, after the same shall have been organized according to said act; it being understood, that in case more than five thousand shares shall be subscribed for, the committee under whose direction this subscription is opened, shall reduce them to that number, in such a mode as they shall think equitable."

The act of incorporation referred to, (*St.* 1825, *c.* 148, passed on the 4th of March, 1826,) provides, in the 4th section, "that the capital stock of said corporation shall be divided into five thousand shares, not exceeding one hundred dollars each." The 6th section provides, "that the said corporation, or its officers duly authorized by its by-laws, may, from time to time, make assessments upon the shares subscribed for, until the whole amount of the said capital stock shall be paid in. And if the proprietor of any share shall refuse or neg-

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lect to pay any assessment for the term of thirty days from the time appointed therefor, the share or shares of such proprietor may be sold by public auction. In the 7th section it is provided, that the persons named in the act, or any two of them, shall call the first meeting of the corporation, by giving notice in one or more of the Salem newspapers; "and at said meeting there shall be chosen, by a majority of votes, a clerk or secretary, who shall be duly sworn to record the doings thereof; and any act or acts may be done for the purpose of organizing the said corporation, and arranging its affairs; at which meeting every person shall be entitled to one vote for each share owned by him. And the number, powers and duties of the several officers, agents and servants of said corporation, together with the time and manner of choosing and appointing them, and the number of votes to which the shares of each member of the corporation shall entitle him at future meetings, may be regulated by the by-laws. Provided, however, that no meeting as aforesaid shall be called before one thousand shares shall be subscribed for; and provided also, that no proprietor shall be entitled to more than twenty votes."

In the 9th section it is enacted, that if at any time the corporation shall use the water power to be created by them, for the purpose of carrying on manufactures, the corporation shall be subject to the provisions of "an act defining the general powers and duties of manufacturing corporations," except that the liability of the members, in their individual capacity, for the debts of the corporation, is to terminate, unless such debts shall be put in suit against them within one year after they shall have ceased to be members.

At the trial, which was before *Putnam* J., it appeared that the defendant had subscribed for twenty shares. On the 17th of May, 1826, the first meeting of the stockholders was held, when the act of incorporation was accepted by a unanimous vote, and the corporation was organized according to the act. The report of the committee for obtaining subscriptions was laid before the meeting, stating that the number of shares
25 subscribed for was at that time twenty-three hundred and seventy-eight, and recommending that subscriptions should not be received after the whole number of shares subscribed

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for should amount to three thousand. Additional subscriptions were subsequently obtained, so that on the 4th of September, 1826, the whole number of shares subscribed for was twenty-six hundred and eighty-seven; and this number was never afterwards augmented. On that day the first assessment, being three dollars on each share, and for the defendant's proportion of which this action was brought, was laid by the directors, pursuant to the by-laws, to be paid into the treasury of the corporation on or before the 13th of September. At a meeting of the directors on the 24th of October, it was voted to proceed in the erection of the dams, whenever available funds to the amount of 250,000 dollars should be obtained. One hundred and twenty-five of the shares subscribed for were then supposed to be insolvent and not available. The defendant was then a director, and a large sum of money had been expended by the board of directors, and many contracts had been made by them. The defendant was present at the first meeting of the stockholders, and likewise usually attended the subsequent meetings of the corporation.

The defendant moved for leave to prove that the sum for which subscriptions had been obtained, was insufficient to complete the work undertaken; but the motion was overruled.

The books and records of the corporation and directors made a part of the case.

According as the opinion of the Court should be upon the foregoing statement, a default or nonsuit was to be entered, or a new trial granted.

Pickering, for the plaintiffs. The question is, what is the true construction of the contract upon which this action is founded. On its face, it is an unequivocal agreement to take a number of shares, and to pay all such legal assessments as shall be made thereon after the corporation shall be organized according to its charter; and the corporation was so organized before this assessment was laid.

Nov 9th

The object of the charter will afford some aid in construing the agreement. The parties had in view the creation of a water power by means of dams, and the prosecution of manufactures. These were to be successive operations, and it was

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supposed that a sufficient fund for the erection of the dams might be raised upon a part only of the 5000 shares into which the capital stock was to be divided. This is to be inferred from the proviso in the 7th section of the act of incorporation, that "no meeting shall be called before 1000 shares shall be subscribed for." It could not then be necessary, as the defendant will contend, that the whole 5000 shares should be taken up, in order to render an assessment valid.

This assessment might be necessary to defray various preliminary expenses in procuring the act of incorporation, making surveys, examining titles, &c. And the Court cannot say that it was not required for the incidental expenses of organizing the corporation.

The acts of the parties have given a construction to the contract. The corporation voted that the subscriptions should not be extended beyond 3000 shares. The defendant attended the meetings, was himself a director, and assisted in laying the assessment, and in making large contracts on behalf of the corporation. He has thus declared that he would pay his assessments notwithstanding all the shares were not taken, and he is estopped to make that objection. *Chester Glass Co.* v. *Dewey*, 16 Mass. R. 94.

The 4th section provides, that the capital stock shall be divided into 5000 shares, and the 7th, that no meeting shall be called before 1000 shall be subscribed for. Taken together, these provisions mean, that the number of shares shall not be more than 5000 nor less than 1000.

Neither in the charter, nor in the contract, is there any express condition that all the shares shall be subscribed for, and it is apprehended that none such is implied. Where a condition of this kind is intended, it is usually expressed, either in the act of incorporation or in the subscription paper. The limitation of the capital stock to 5000 shares does not sustain
27 such an implication. That has no bearing upon the relative rights of the corporation and stockholders; it is a matter between the corporation and the government, the design of it being to prevent an undue proportion of property being held in mortmain. 1 Kyd on Corp. 103, 104. The individual stockholder is protected by limiting the assessments to 10C

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dollars upon a share. An implied condition like the one in question, would present a great obstacle to carrying on an enterprise of this kind, as a single share not subscribed for would defeat the whole project. It cannot be supposed that the legislature intended to embarrass this corporation by such an implication.

Saltonstall and *Shillaber*, for the defendant. The act of incorporation makes part of the contract, and the defence proceeds upon the ground, that the plaintiffs have not so far complied with the requisitions of that act as to make the assessment "legal."

The provision, that the capital stock shall be divided into 5000 shares, is imperative. It is not an implied, but an express condition of the contract.

It has been suggested, that the statute itself makes the division, or that entering in the corporation book, shares numbered from 1 to 5000, is a compliance with the statute. We think, however, that the shares must be real, available stock, owned by individuals, and not existing merely in name. The object of the charter was to enable the plaintiffs to carry into effect a project of great magnitude, in which the public were interested as well as the corporation, and for which a large capital would be required. A dam was to be thrown across an important navigable river. The equivalent to the public for the privileges granted, was the provision in question, which was intended to secure a fund adequate to the full accomplishment of the undertaking.

In contracts of this nature between other corporations and individuals, similar provisions have been made respecting the number of shares. In *Worcester Turnpike Corp.* v. *Willard*, 5 Mass. R. 80, as the act of incorporation did not specify the number, it was stipulated in the contract itself that there should be 600 shares, and it was averred in the declaration, and proved at the trial, that 600 had been subscribed for. See also *New Bedford &c. Turnp. Corp.* v. *Adams*, 8 Mass. R. 138.

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It was important to the defendant to be assured that he should not lose his money, by reason of a failure to complete the undertaking. The corporation had in view successive

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operations, we admit, but it was likewise contemplated, that the whole sum of 500,000 dollars should be at their command to apply to one operation, in case it should be necessary. For if with only 1000 shares taken, they should engage in a work requiring more than 100,000 dollars, after 100 dollars has been assessed on each share the work must be suspended, perhaps with a sacrifice of all the money laid out upon it.

The defendant subscribed with an intent to be concerned in manufactures, according to the provision in the 9th section of the charter, it being supposed that the whole capital stock would be sufficient to create the water power and to establish a manufactory. But if the corporation could begin to act with only 1000 shares subscribed for, their whole fund would be exhausted by the erection of the dams, and so the defendant's object would be in part defeated ; unless they should engage in manufactures upon credit, and then his whole property might be taken for the debts of the corporation. This consequence might indeed happen, even if all the shares were taken up, but the risk would be comparatively small.

It has been objected, that if all the shares were subscribed for, the defendant's proportion of responsibility might be increased by the insolvency of some of the subscribers. The answer is, that in regard to this he would have all the security which was contemplated by the act of incorporation. The insolvent shares might be sold.

The provision that a meeting may be called when 1000 shares shall be subscribed for, instead of a privilege, is a restraining clause But for this provision, the persons named in the charter might have held a meeting for the purpose of organizing the corporation and arranging its affairs, before any shares were taken. The other enactments in the same section show, that the terms " organizing the corporation and arranging its affairs," include only proceedings preliminary to the execution of the great objects of the charter.

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The defendant has not by his own acts waived any rights or changed the nature of the contract. Here is an express contract made with him as a stranger to the corporation, and it must be proved as alleged. If he attended meetings of the cor-

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poration and voted, it was only as a corporator, and not with any reference to this contract; which was a collateral undertaking. *Middlesex Turnp. Corp.* v. *Locke*, 8 Mass. R. 268; *The Same* v. *Swan*, 10 Mass. R. 384.

It is suggested, that this assessment may have been laid for the purpose of defraying incidental preliminary expenses. Had it been so, the defendant would not have obliged the corporation to resort to this action.

Mason, (of New Hampshire,) in reply, insisted that the assessment was legal.

The act of incorporation authorizes a meeting after 1000 shares are taken, for the purpose of organizing the corporation and arranging its affairs. It is not common to insert a clause of this nature in acts of incorporation, and if the design was to provide for the mere ceremony of organization, it should seem to be superfluous. A better reason however for this provision may be easily discovered. The act describes works of great extent and importance, which were proposed to be undertaken, and the object of this clause was, that reasonable evidence should be afforded of the ability of the corporation to proceed in them with a prospect of completing them. They were to be undertaken successively, and after the water power should be created, the corporation had the option to dispose of it to other persons, or to use it for carrying on manufactures. As soon therefore as the corporation was organized according to the act, it was in full operation. Arranging its affairs includes the appointment of agents with full power to transact all the business of the corporation.

The true question then is, whether the charter restrains the corporation from making assessments before the whole 5000 shares are subscribed for. The contract seems to contemplate that assessments will be laid immediately after the organization, and there is no express provision in the charter to prohibit it; and it must be a necessary construction that shall lead the Court to imply that it cannot be done until all the shares are taken. The 1st section limits the capital of the corporation to 700,000 dollars, which is on the ground of public policy; and the 4th prescribes that the stock shall be divided

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into five thousand shares, not exceeding 100 dollars each, the object of which is to prevent more than 500,000 dollars being drawn from the stockholders by assessments. Without contravening these enactments, the corporation may vote at once that they will not assess more than 5 dollars on a share, and then what becomes of the supposed security to the public and to the defendant? It has been remarked, that the shares are entered in the corporation book and numbered from 1 to 5000. We insist that this is a division within the meaning of the act.[1] The act itself, in saying that the stock shall be thus divided, makes the division. The practice of other corporations is in conformity with this view of the subject. It is usual to have *reserved* shares. In the act incorporating the Boston and Roxbury Mill Corporation, the capital stock is divided into 3500 shares, and provision is made, that when 2000 shall be taken, the subscribers may organize the corporation and arrange its affairs, and if the funds raised upon 2000 shares shall be insufficient, the corporation is authorized to sell the shares not subscribed for. Here then is a legislative construction, that organizing a corporation and arranging its affairs, puts it into full operation.

The 6th section provides, that this corporation may "make assessments upon the *shares subscribed for*, until the whole amount of the said capital stock shall be paid in." What does this imply, but that some shares may not be subscribed for, and that the reserved shares may be disposed of at any time, as occasion shall require?

The contracts made by the corporation are binding on it. The plaintiffs cannot say to their creditors, that there was an occult condition which was not complied with, and that therefore they are not held; and if they are held, the money necessary to fulfil the contracts can be raised only by assessments. So of the incidental expenses which must have been incurred in organizing the corporation.

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At least, the defendant is estopped by his own conduct to contest the validity of the assessment. He has participated in all the acts done by the corporation, and has led it on to in-

[1] See Revised Stat. c. 38, § 9, 10

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cur heavy expenses; and shall he be permitted to throw the whole burden upon his associates who have paid their assessments?

The case cited of *Middlesex Turnp. Corp.* v *Swan*, has no bearing on the one under consideration. It was there held, that a subscription for one road could not apply to a different road. It was a case of variance. The present is one of construction. The defendant could only expect that 5000 shares would be subscribed for, but with the knowledge that the subscription might fall short of that number.

The opinion of the Court was afterwards drawn up by

PARKER C. J. Upon the general question presented in the argument of this case, *viz.* the legality of an assessment for the general objects and purposes for which the plaintiffs were incorporated, the Court are unanimously of opinion that such assessment would not be valid.

We are brought to this opinion by a careful consideration of the act of incorporation, and by a just construction of the obligations incurred under the instrument by which the individual members associated and became corporators. We consider the special promise incorporated with the subscription, as making the persons and property liable, to the extent of the subscription; that is, to pay all assessments which shall be legally made; the object of this form of subscription being obviously to create a personal duty upon those who should subscribe, beyond the statute liability which can be enforced only against their shares. The principle has heretofore been settled in analogous cases, that a mere subscription creates no promise, and gives no security to the corporation beyond the value of the stock, but that a promise superadded gives a right of action, where there are parties in being to give and take the promise.[1] And this distinction is reasonable; for as the objects for which such incor- 32
porations are applied for and granted are generally experimental, and as expenses must be incurred in trying the experiment, it is right and just that those who embark in the same cause should be holden to each other for a fair apportionment of the

[1] See *Bryant* v. *Gordnow* 5 Pick. (2d ed.) 230 and note 1.

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expenses; and it is not unjust, if a majority of those who associate should determine to complete the object, that those in whose promises they confide to bear their proportion of expense should be compelled to pay. But all such promises are in their nature conditional, and depend upon the terms on which they are made, with reference to the capacity, duties and powers of the other party to the contract, the corporation; who cannot extend the effect of the promise beyond the original meaning and extent of it, any more than the other party can limit it.

The power of corporations is derived only from the act, grant, charter or patent by which they are created. In this Commonwealth the source and origin of such power is the legislature, and corporations are to exercise no authority, except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators.[1] If created with a fund limited by the act, it cannot enlarge or diminish that fund, but by license from the legislature, and if the capital stock is parcelled out into a fixed number of shares, this number cannot be changed by the corporation itself. Vide 1 Dane's Abr. 457, *c.* 22, *art.* 1, and the numerous authorities cited by that author. The promise on which this action is brought must be construed with reference to the charter of the company, it being founded on that, and is to be governed by it.

What then are the terms and the legal effect of the contract now under consideration? The words, after stating the object of the subscription and referring to the act of incorporation, are —

"We the subscribers severally agree to take the number of shares of the capital stock in said corporation, which are affixed to our respective names, and to pay all such *legal assessments* on each of said shares, as shall be made by the
33 future government of said corporation, after the same shall have been organized according to said act; it being under-

[1] See Angell & Ames on Corp 80, 81.

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stood, that in case more than five thousand shares shall be subscribed for, the committee, under whose direction this subscription is opened, shall reduce them to that number, in such a mode as they shall think equitable."

An analysis of this contract will show the true and only fair construction of it. The promise is to pay all *legal assessments*. Upon what? Upon the shares subscribed for. Shares of what? Of the capital stock of the company created by the act of incorporation. What is this capital stock? This must be answered by the act of incorporation, upon which the whole contract is founded; and a reference to that shows manifestly, that the whole capital stock is composed of five thousand shares, which are liable to be assessed to the extent of one hundred dollars on each share. So that, *potentially*, the capital stock is five hundred thousand dollars, but the corporators have a right to limit it to any less sum, by the assessment upon the shares, according to the amount of capital wanted for the object.

But this power of limitation is a privilege attached to the shares, and we think most clearly cannot be taken away by a reduction of the number of shares, leaving to the subscriber the hazard of being liable upon his subscription and promise to an amount much beyond what the actual expense of the project might subject him to, if the original number of shares were liable to assessment. Suppose, instead of the contemplated sum of five hundred thousand dollars, in the process and execution of the project, one hundred thousand dollars should be found to be competent to the purpose. Then it would follow, that upon five thousand shares a tax of twenty dollars on each share would be sufficient; whereas, if the shares were reduced to one thousand, an assessment to the whole extent of one hundred dollars on a share would still be necessary.

Now a person called upon to subscribe, would naturally make his own calculations of the probable cost of the undertaking. He would see that the utmost limit of taxation is one hundred dollars upon a share, and that probably not more 34
than one half of that sum would be required. I say probably, because the very fact of proceeding in the execution of

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the project with but little more than half the number of shares taken up, shows the opinion of the corporation, that half the contemplated capital would be sufficient. We think the subscriber cannot be deprived of this probable advantage, by the vote of the corporation reducing the number of shares, and that a tax founded on such reduction would be illegal.

Such we think is the spirit of the act of incorporation, the intent and meaning of the limitation of the number of shares to constitute the capital stock. It could have been introduced for no other purpose than to show the extent of liability. The accomplishment of this project *may* cost five hundred thousand dollars; there shall be therefore five thousand shares liable to the extent of one hundred dollars each. It *may* cost much less; the shares may be taxed much less, but cannot be carried beyond one hundred dollars. These are the terms held out to the subscribers by the act of incorporation, and by the subscription paper itself; for the promise is, to pay what shall be *legally* assessed *according to the act of incorporation*. Besides which, it is agreed, that if there be an over-subscription, the shares shall be reduced to the number prescribed in the act; and there is no provision for the case that has happened, of not much more than one half of the number of shares being subscribed for.

There is another view of the subject which goes strongly to show the correctness of this exposition of the contract. Suppose the sum contemplated by the legislature as at least the possible cost of the undertaking, should turn out *to be all necessary* for its accomplishment; so that the expenditure of one half of the sum, would, in all probability, without the means of increasing it, be the cause of the loss of every thing but the value of the materials: — would the corporation have the right, by thus reducing the number of shares, to put in jeopardy the property of the corporators? Certainly not. Every subscriber has a right to calculate upon a fund computed to be commensurate with the object, and that each of five thousand shares should be liable, like his own, to a tax
35 of one hundred dollars, in order to produce that effect. A power in the corporation to reduce the shares to one thousand, without the power of taxing them beyond one hundred

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dollars, would be a power to expend one hundred thousand dollars and no more, upon a project, which, to be profitable or even useful, would require five times that amount. The money expended in such case, would be nearly all lost and wasted. Nor do we believe that the corporation can make such a reduction legal, by a vote to limit the assessment upon a share to a less sum than one hundred dollars; for the same result of insufficient funds, and a consequent loss, might be produced.

If the subscription paper or contract had been in a form of words a little different, a question could hardly arise as to its construction. Suppose it had been, — Whereas it is proposed to raise a sum, not exceeding five hundred thousand dollars, for the purpose of erecting dams, &c. in the town of Salem, and the capital stock is divided into five thousand shares, now we, the subscribers, agree to take the number of shares set against our names and pay such sums as shall be assessed upon our shares. What does this import, but that the subscriber to a share agrees to take and pay for one *five thousandth* part of the capital stock to be raised? Could he, in that case, by virtue of such contract, be held to pay a *thousandth* part? Certainly not. Now the subscription paper in this case is precisely of the same character, and of the same legal import and effect. That subscription and promise refer to the act of incorporation. That act requires that the capital stock shall be divided into five thousand shares; and the paper itself recognises that number as expressive of the amount of stock.

It has been urged however in argument, that an examination of other parts of the act of incorporation will show that it was the intention of the legislature, that the company, when organized, might proceed to execute the full purposes of their incorporation by assessments upon any number of shares over one thousand.

We construe the 7th section of the statute very differently, and think it shows most manifestly, that the legislature had in view an organization for special and limited purposes, 36
previously to the completion of the stock by a full subscription. What is this provision of the 7th section? Any two

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of the persons named in the act of incorporation are authorized by it to call a meeting immediately after the passing of the act, at which meeting a clerk or secretary may be chosen, who shall be duly sworn to record the doings of the meeting; and any acts may be done for the purpose of organizing the said corporation and *arranging its affairs*: Provided no meeting shall be called as aforesaid, before one thousand shares shall be subscribed for.

It is clear that it was not intended by this section to grant a power not contained in the other sections of the act, except so far as to authorize the calling of the first meeting for the necessary purpose mentioned in the section. It was to be a meeting of organization and preparation. Not even the officers, except the clerk or secretary, were to be chosen; but they were to arrange their affairs, that is, take all the preliminary steps necessary to the advancement of the undertaking, — provide by-laws, agree upon the number of votes, and prescribe the powers, duties and number of the general officers and agents necessary to be employed, together with the time and manner of choosing and appointing them. Clearly this was intended by the legislature, to grant the power of acting only to a limited extent, for the mere purpose of taking such precautionary and preliminary steps as would be absolutely necessary to the success of the undertaking, and even to the procurement of a full subscription. At this meeting "*any act or acts may be done for the purpose of organizing the said corporation, and arranging its affairs; at which meeting every person shall be entitled to one vote for each share owned by him.*" Why limit the powers of this meeting to these specified objects, if, as contended, the corporation had full power of raising the whole capital upon any number of shares not below one thousand? And this too, under the phrase *arranging its affairs*, which obviously means something short of carrying into execution the project in full, and assessing those who may have subscribed, to the extent of the liability of the shares. The
37 corporation, under this section, had the same power of taxing upon one thousand and one shares, as they would have upon twenty-six hundred; and can it be supposed, that un-

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der the general terms of this act, and under the subscription, they can have the right to reduce the taxable capital down to one fifth of that on which the subscription was founded? Upon what principle can a tax on two thousand and six hundred shares be sustained, that would not equally justify one upon any less number not below one thousand? But it is said they became a corporate body by the acceptance of the act, and being such they enjoy all the powers vested in the body, and, of course, the power of proceeding in the objects of the incorporation, and then of necessity follows the power to assess all necessary taxes. But all this is *petitio principii*. The whole question is, whether they were a body politic and corporate with full powers, before the capital stock was created, and whether the legislature was not careful to give only limited powers until that event should happen. For no other reason is it possible to conceive why the specification of power under the 7th section should have been enacted. And it certainly cannot be within the authority of a company, by a vote, to assume a power beyond the provisions of their charter.

This question goes deep into the interests of those who embark in projects of improvement with the right to calculate upon a certain capital, and on their own liability to contribute towards raising it. If with the expectation of five hundred associates, or shares in that proportion, those who represent two hundred can assemble, and agree to carry on the whole work, by a major vote of that number, and assess themselves and the rest, and these doings are binding on the minority, the effect will be to discourage such enterprises, and subscriptions to objects which from their nature must be of doubtful success, will cease. A man may be willing, from public motives alone, to take his chance upon a limited proportion of five thousand shares of a capital stock, and altogether unwilling to adventure upon half that number; and if he secure himself by the terms of his subscription, he cannot be bound beyond it by a major vote of those who may choose to persist in the adventure under discouraging circumstances.

But it has been argued, that, by the 6th section of the act of incorporation, the power of making assessments upon less

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than the whole number of shares contemplated as the amount of the capital, is given by express provision or necessary implication. We think a contrary inference more natural and just.

This section provides, that the corporation, or its officers duly authorized by its by-laws, may from time to time make assessments *upon the shares subscribed for*. If this had been all, the argument would have been plausible, but only plausible; for the whole statute would be taken together, in the construction, and then by the shares subscribed for, would be found to be intended the five thousand shares which were to constitute the capital stock. But the assessments are to be made upon *the shares subscribed for, until the whole amount of the said capital stock shall be paid in.* Now the capital stock here contemplated was five hundred thousand dollars, because the power was given to assess to the whole extent of one hundred dollars a share on all the shares. The object of this section, to wit, an assessment upon the shares subscribed for until the capital stock should be paid in, could never be attained by assessments upon less than the whole number of shares; and therefore the legislature did not intend by this phraseology to defeat this general object before ex plicitly stated. There is nothing then in the statute, which has a tendency to vary the obvious and necessary construction of the 4th section, which requires that the capital stock shall be divided into five thousand shares. This is to govern and limit the contract upon which the suit is brought, for the contract is referred to and founded upon this provision. And to extend it further would be to substitute a contract of our own making, for that on which the parties agreed.

And we perceive not the hardships which have been said to be likely to follow this decision. The act of incorporation remains in full force. If the proposed undertaking is likely to prove useful and profitable, it will be no difficult matter to procure subscribers enough, in addition to those
39 already bound, to authorize the company to proceed. In that case the present subscribers cannot recede, and we think them bound by their promise, as well as upon their shares, to submit to and pay all the assessments which may then be

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made within the terms of the act. It probably was never before attempted to proceed to the final execution of a public or private project compulsorily, upon one half of the contemplated shares set forth to the subscribers as representing the amount of stock. In the act establishing the Boston and Roxbury Mill Dam company, the possibility of a failure of the subscription was anticipated and guarded against, by enacting in the 9th section, that the corporation, or its officers, may make assessments on the shares subscribed for, for the purpose of effecting the objects of the corporation, and for any other necessary purpose; provided that the whole amount of the assessments shall not exceed one hundred dollars on each share, and in case the amount of one hundred dollars so assessed upon each share will not supply the necessary funds, the corporation may raise the funds required by *selling any shares not subscribed for*, or by creating and selling any number of shares over and above the number prescribed in the act. The subscribers under this act of incorporation were aware that their shares might be assessed, although the subscription might not be full, and probably considered it immaterial, as nothing but their shares would be liable; and even if they should make special promises to pay the assessments, they would do it with a full knowledge of the consequences. Not so in the case before us, for from the tenor of the subscription paper, and the act of incorporation to which it referred, they would have no means of conjecturing, that by a vote of the corporation reducing the number of shares, they might be held personally to pay a much larger sum than otherwise would be chargeable upon their shares.

Hitherto we have considered only the general question, whether the corporation can proceed to make assessments for the general objects and purposes of the charter, upon the subscription as it now stands, or upon any number of shares less than the whole number into which the capital stock is divided by the act.[1] It is a distinct question, whether the action can be maintained for the specific tax for which it is brought. 40

[1] See *Salem Mill Dam Corp.* v. *Ropes*, 9 Pick. 195; *Central Turnp. Corp.* v *Valentine*, 10 Pick. 145, 146.

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It is agreed in the statement of facts, that previously to the assessment of this tax, "a large sum of money had been expended by the board of directors, and many contracts had been made by them." The amount of the money disbursed, and the nature and extent of the contracts, are not specified; but it appears by a certificate of the treasurer, which has been handed to us since the argument of the cause, that the disbursements made, together with what is due for necessary expenses, amount to 11,412 dollars and 23 cents; and that contracts have been made for land, wharves, flats, &c. to the amount of 10,512 dollars and 50 cents: besides which there are other pending contracts, relating to timber and materials, the nature and amount of which are not stated. In regard to these contracts, we do not think they afford a basis for the assessment, because they relate to the end and the object of the corporation; and whether authorized or not, so as to make the corporate property liable for damages for the breach, or the directors by whom the contracts were made, or such members of the corporation as may have expressly assented to the making of the contracts, we are clear that the corporators are not personally liable upon their promise, because an assessment for this purpose is not a legal assessment within the terms of the promise and within the provisions of the act.

If the corporate powers to the extent of assessing upon the stockholders for the whole expense of the undertaking, did not exist until the whole number of shares had been taken up, which we think has been shown, it follows, necessarily, that there was no power in the corporation to authorize contracts made for the purpose of completing the undertaking; and then it would also follow, that the act of the directors in making such contracts was without legal authority. If it be granted that a contract justifying an assessment, could be made for the purchase of lands, wharves, &c. to the value of ten thousand dollars, it would not be possible to deny to the di-
41 rectors, the same power to make one or more contracts for the completion of the whole object, should it require the utmost limit of taxation upon the shares. This, it is said, will

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be hard upon those who have contracted with the directors or their agent, upon the faith and confidence that their acts would bind the corporation and the individual corporators by the terms of their subscription. But if hard, it is not new, that persons have made contracts with supposed agents, expecting the principals would be bound, and have been obliged to rely for their remedy upon the personal liability of those who assumed to be agents.[1] But it will be hard upon the directors to be made personally liable on contracts which they supposed they were making for the corporation. This is true; but the hardship cannot affect the legal principles by which the case must be governed. If property was the subject of their contracts, and the directors should be obliged to pay for it, the property will be theirs; if damages only for the non-performance of the contracts should be recovered, it may be supposed that the terms of the bargain were so equal as to produce no great distress; and if any of the corporators stimulated the directors to the exercise of this authority, by acts or votes, it may be that such persons will be held, in a proper action, to contribute to make up the loss. But those corporators who dissented, not being bound by the tenor of their original contract, cannot be held to contribute towards expenditures which were not warranted by the state of the corporation when they were incurred. From the precaution used in regard to the contracts actually made, of making them depend on the prosecution of the enterprise, it is not probable any difficulty will arise from this source.

But in regard to the disbursements actually made in money, or for which contracts are subsisting, in relation to expenses of a preliminary nature, necessarily incurred to obtain knowledge on the subject of the undertaking, or for the purpose of forwarding the subscription, and extending the public patronage, we have come to a different conclusion; in which we think we are equally well warranted by the act of incorporation and by the terms of subscription. We suppose all the prelimina-

[1] See *Hastings* v. *Lovering*, 2 Pick. 221; *New England Mar. Ins. Co.* v *De Wolf*, 8 Pick. 56. 2 Kent's Comm. (3d ed.) 631, 632.

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ry expenses, such as for necessary surveys, legal advice in relation to titles to land which it might be necessary to acquire, employment of many persons, expense of meetings, and a variety of charges incident to the commencement of so considerable an object, are in the nature of charges either upon the original promoters of the design, or upon the corporation when organized; upon the latter, if they expressly or by implication assume the same. And we take it for granted that these expenses have been assumed, and that they constitute the amount stated as actual disbursements by the directors, or that similar expenses have since been incurred by the corporation itself, which constitute these disbursements. On this subject however we are not sufficiently informed, as the items which compose the gross sum charged as disbursements, are not stated. If we found our opinion upon a false basis in this respect, and the parties think it worth their while to contend further, a new trial can be ordered to settle this point

Supposing then that the sums expended are for objects such as above mentioned, or similar to them, that is, for purposes preliminary to the actual execution of the project, we think a tax not too large to cover such expenditure is valid, and that the defendant is bound upon his promise to pay it.

And we found our opinion upon a deliberate consideration of the act of incorporation, and particularly the 7th section of that act.

The legislature and the petitioners for the act, were probably aware, that the nature of the project which was wished to be authorized, was such as to require considerable expense, in order to produce that degree of information which would be necessary to insure a sufficient subscription. The scheme was new, except that it was preceded by the Boston and Roxbury Mill Dam Corporation, which, notwithstanding the most sanguine expectations, was known to have failed in regard to any profit to be derived by the owners of stock. The employment of much skill and judgment was requisite to enable them to show the practicability of the scheme, and its utility or probable profit. Provision therefore was made in the act of incorporation, for the organization of the com-

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pany upon one fifth part of the number of the shares constituting the capital stock, and power was given to the corporation so organized, to "arrange its affairs." We have before shown that the power given under this phraseology was necessarily a limited power. We are equally clear, that more was intended than a mere organization, for this power of arranging its affairs is superadded to the power previously given, to organize the company. Within the reasonable construction of this phrase, "arrange its affairs," (presuming, as we are bound to presume, that something was intended,) we think was given the power to look into the circumstances and affairs of the project, the expense to be incurred to bring it into its existing state, the measures necessary to attract the public approbation and patronage, delineations, plans, surveys, philosophical examinations of the surface and contents of bays, coves, &c. to be occupied, expense of meetings, procuring subscriptions, &c. all of which might be necessary to enable the projectors to give such an exhibit of probable results as would be likely to promote the subscription.

Having this power in regard to these preliminary arrangements, and being a corporation, we think the power to assess for the purpose of defraying the consequent expense, necessarily follows; for without any express authority, corporations may raise money by assessments for the legitimate purposes of their institution.

And power to this extent must be presumed to have been recognised by each subscriber, for he refers to the act, and is bound by a fair construction of it, whether he was aware of it at the time or not.

Had the corporation, immediately upon its organization, with one thousand shares only subscribed, voted to raise ten thousand dollars for the purpose of enabling the directors to procure all necessary information, and to take all proper measures to procure a full subscription to the projected measure, and to pay all expenses which had been incurred in obtaining the act of incorporation and otherwise in promoting the object, we cannot doubt but an assessment found-

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ed on such vote would have been legal and valid, and would be justified under the power given to "arrange its affairs." Such purposes would be mere arrangements, and the power being granted to make them, draws after it the power of providing by assessments for the expenses certainly and necessarily incident and consequent.

Suppose after such measures had been taken, and an expense unavoidably incurred, the result of the investigation had been so unfavorable as to induce the majority of the actual corporators, or of shares, according to the mode of voting, to discontinue any further proceedings, and abandon the project; — how shall these expenses be defrayed? Certainly by a tax, for the expenses were incurred for the corporation, and with full power to incur them by virtue of the 7th section of the act. It is true, a tax might be unavailing amidst such circumstances, if there were no obligation collateral to that which by law rests upon the shares; but where there is a personal engagement, there is no difficulty. Every subscriber, in such case, is made to pay what he promised, and no more. The assessment only apportions upon each subscriber his quota of the whole expense, according to his interest in the undertaking.

No vote has been produced showing the purpose for which this assessment was granted, and we do not think it necessary; for if the whole product of the assessment does not exceed the sum wanted for the expenses which may lawfully be provided for in this way, it may be presumed that this was the object of the assessment, and that the money so raised will be applied to these purposes.

The result of the whole is, that the defendant is personally bound by his promise to pay all such assessments as should be legally made; that an assessment made to raise money to defray expenses necessarily incurred in arrangements preparatory to the execution of the objects of the incorporation, is legal; that expenses of that nature having been incurred, and the assessment which is the subject of this suit not exceeding the sum necessary for the payment and discharge of them, the
45 defendant is answerable for his proportion, according to the

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number of shares he subscribed for, and must therefore be defaulted.* [1]

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* The following case was determined upon the like principles.

PROPRIETORS OF NEWBURYPORT BRIDGE
versus
CHARLES W. STORY.

ASSUMPSIT. The plaintiffs proved that they were incorporated (by St. 1825, c. 164) for the purpose of building a bridge over Merrimack river; that the defendant, on the 14th of March, 1826, and before the first meeting of the corporation, subscribed the agreement upon which the action was brought, to take thirty shares in the stock of the corporation, and to pay the assessments when called for by the treasurer of the corporation, agreeably to the act of incorporation and the by-laws which might thereafter be made, provided the same should not exceed forty dollars on a share. The corporation was organized on the 24th of March, and an assessment of five dollars was laid, which the defendant paid. An assessment of ten dollars was afterwards laid, to recover which this action was brought.

The 5th section of the act of incorporation provides, that the stock shall be "divided into one thousand shares;" and the counsel for the defendant contended, among other things, at the trial, that it was incumbent on the plaintiffs to show that the stock had been so divided. But in this they were overruled. They likewise offered to prove that the whole number of shares had not been taken up, but this evidence was rejected.

A verdict was found for the plaintiffs.

Saltonstall and *Shillaber*, for the defendant. *Nov 8th.*

Cushing, for the plaintiffs.

Per Curiam. In this case, it not appearing that when the sum demanded was assessed, the number of shares prescribed in the act of incorporation had been taken up, nor that there was authority under the act to lay an assessment for any purpose before the subscription should be full, under which circumstances this assessment would be void, the verdict must be set aside and a new trial granted. *Reporter.* *April term 1828*

[1] See Angell & Ames on Corp. 306 to 308

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JOHN MERRILL *versus* BAILEY BARTLETT.

Where two persons build a ship together, to be owned by them in certain proportions, and one advances more than his proportion of the expenses, he has no lien on the ship for the balance due to him, but the interest of the other in the ship, at least to the extent of his advances, is liable to attachment at the suit of other creditors.

THIS was an action on the case against the sheriff of Essex, for the default of one of his deputies in not applying to an execution in favor of the plaintiff against Joseph Edwards, property which had been attached by the deputy on the original writ against Edwards.

Upon the report of an auditor it appeared, that on the 8th of October, 1823, an agreement in writing was made by W. Merrill, J. Edwards and W. Sargent, according to which W. Merrill was to build a vessel for Edwards and Sargent, who were to furnish the materials, Edwards one fourth, and Sargent three fourths. At the time of making this agreement, it was also agreed by Edwards and Sargent, by parol, that the vessel should be built for and be owned by them in the same proportions. Edwards was the general agent to make contracts for materials, and between the date of the written agreement and the 20th of April, 1824, he made divers contracts of that kind, one fourth part of which were on his own account. On the 20th of April he became insolvent, being largely indebted to Sargent for sums of money advanced by Sargent beyond his proportion, for the materials and building of the vessel. On that day the plaintiff attached the vessel, while unfinished, n a suit upon a demand against Edwards alone, and Sargent made a subsequent attachment upon the same property, in a suit brought to recover the debt due to him from Edwards, as before mentioned. The plaintiff and Sargent recovered judgment respectively against Edwards, and the officer, at the request of Sargent, sold the right and interest of Edwards in the vessel, and applied the proceeds toward the satisfaction of Sargent's execution, instead of the plaintiff's.

Nov. 7th. The cause was argued by ***Marston***, for the plaintiff, and ***Saltonstall*** and ***Shillaber***, for the defendant.

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The opinion of the Court was drawn up by

PARKER C. J. The question arising on this report seems to be, whether Sargent, to whom the sheriff paid the proceeds of the sale of the ship, so far as the same were supposed to belong to Edwards, is entitled to hold the same in preference to the plaintiff, who had attached Edwards's interest in the vessel for a debt due to him. We cannot perceive how a lien has been acquired by Sargent. He and Edwards were not copartners, and the vessel was not joint stock. According to the original agreement, they were to be tenants in common of the ship, in the proportion of three fourths to Sargent, and one fourth to Edwards. For all which Sargent advanced towards the share of Edwards, he was his creditor, and he had only the same right as other creditors to attach his interest in the ship and other property belonging to him; and this was his course in the first instance, founded upon a true construction of their relation. One tenant in common of a chattel cannot acquire title to the whole chattel, merely by becoming creditor of his fellow. He may attach like other creditors. That Sargent voluntarily became joint debtor with Edwards for some of the materials used in the ship, does not give him a lien, any more than if each had paid his proportion in the first instance, Edwards having borrowed of Sargent the amount wanted for his share.

In the cases of *Young, ex parte*, 2 Ves. & Beames, 242, and *Daniel* v. *Russell*, 14 Ves. 393, it was decided, that owners of a ship have no lien upon the part belonging to one of the owners who has become bankrupt, for his share of the outfits advanced by them. In earlier times Lord *Hardwicke* entertained a different opinion, as in *Doddington* v. *Hallett*, 1 Ves. Sen. 497. But the late Lord Chancellor *Eldon* expressly overruled that doctrine, which had indeed been questioned before; and in Abbott on Shipping [1] the latter doctrine is adopted as law. Indeed no authority has been

[1] 4th Am. ed. *p.* 78 to 81; *Ex parte Harrison*, 2 Rose, 76; Collyer on Partn. 666 *et seq.*; 3 Kent's Comm. (3d ed.) 39, 40; 2 Story's Comm. Eq. 489, 490; *Michol* v. *Mumford*, 4 Johns. Ch. R. 522. But see *S. C.* 20 Johns. R. 611.

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shown for the right claimed by Sargent. He and Edwards originally became, by their contract with the ship-builder, tenants in common in the proportions before stated. They originally intended to supply materials, and pay the ship-
48 builder, in the same proportions. Edwards actually advanced from his own funds a part of his proportion, and the money he borrowed on the credit of Sargent was intended to be applied to the same object. His failure to pay his proportion did not divest him of his title in the ship. Most clearly he had an interest in her, at least to the extent of what he had advanced, and this was an interest liable to be attached for his debts, and Sargent was but a creditor. The plaintiff in this suit, having made the first attachment, has a right to the proceeds of the sale of the vessel on execution, and the sheriff having neglected to satisfy his execution, his action is well maintained. The defendant therefore must be defaulted and judgment rendered for the amount of the plaintiff's execution, with costs.

In the case of *Thorndike* v. *De Wolf & Trs.* (*post*, 124,) Suffolk, March term 1828, the question of lien of part owners is more fully gone into, and other authorities cited.

DANIEL A. WHITE, Judge, &c. *versus* JACOB B. WINCHESTER.

A testator directs his executor to appropriate towards the support of a school, all the income of twenty-seven shares in one bank, ten and a half in another, and fifteen in an insurance company. When he made the will, he owned just so many shares in the two banks and the insurance company, but before his death he sold his twenty-seven shares in the first-mentioned bank. It was *held*, that the legacy was specific, and that the sale was an ademption *pro tanto*.

THIS was an action of debt on a probate bond, given by the defendant as the executor of the last will and testament of Dennison Wallis. It was brought for the benefit of the inhabitants of school district No. One, in the town of Danvers, and to recover a legacy which the executor refused to pay. The case came before the Court upon an agreed statement of facts.

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The clause in the will on which the legacy depends, is as follows: — "Having the prosperity of the present and succeeding generation in view, I hereby order and direct my executors, or the survivor of them, to appropriate and expend, for and towards the support of a school or schools for the benefit of the whole district Number One, in which I now live, all the income of the following property (after deducting a reasonable sum for their or his attending to the same), to wit, twenty-seven shares in the Beverly bank, at Beverly; ten and a half shares in the Marblehead bank, at Marblehead; and fifteen shares in the Union Marine Insurance office, at Salem; and in case either of said companies shall cease to continue, then my executors, or the survivor of them, shall put the principal on interest, to the best advantage; and the income of the whole (except as above) shall be for ever appropriated to the above purpose, the income to be reckoned from the day of my decease."

The will was dated January 30, 1818. The testator died August 15, 1825. The inhabitants of the school district seasonably demanded of the executor, that the income of twenty-seven shares in the Beverly bank should be appropriated and applied by him for the benefit of the district, agreeably to the direction of the will, but he refused to make such appropriation.

The testator, at the time of making his will, was the owner of ten and a half shares, and no more, in the Marblehead bank, the par value of which was 100 dollars a share, and of fifteen shares, and no more, in the Union Marine Insurance office, the par value of which was 80 dollars a share, and continued the owner until his death.

On the 3d of August, 1803, he was the owner of twenty-seven shares, and no more, in the Beverly bank, and continued the owner until the 13th of November, 1823, when they were sold and transferred by him. On the 30th of May, 1823, he pledged them as collateral security for money hired by him at the Beverly bank, and on the same day he gave to the bank his note for 1200 dollars, in the place of a note for the same amount, on which he was surety for one Upton, and which was taken up at that time by the testator, for the purpose of

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commencing a suit against Upton. On the 24th of July following, the testator hired 200 dollars at the same bank, on the security of these shares. The note for 1200 dollars was paid about the 12th, and the note for 200 about the 15th of November, 1823; and in the opinion of the cashier of the bank, for the reasons stated in his deposition, the proceeds arising from the sale of the shares were applied to the payment of these notes. The par value of the shares, at the time of making the will, was 62 dollars and 50 cents, and has continued the same ever since.

For the purpose of showing the motives and inducements which operated on the mind of the testator in selling the shares in question, certain depositions were made a part of the case, their competency and effect being referred to the Court. From these it appeared, that in consequence of many persons becoming insolvent, he was unduly alarmed, and being unexpectedly called upon to pay notes which he had indorsed, he sold the shares, from an imagined necessity, to raise money, though in fact his credit was unimpaired and he might without difficulty have obtained a loan of the sum required.

If the Court should be of opinion, that the inhabitants of the school district could maintain their claim for the benefit of these shares, upon any principle of law or equity, within the jurisdiction of the Court, judgment was to be rendered for the plaintiff in such manner as the Court should order; if otherwise, the plaintiff was to become nonsuit.

Nov. 8th. *Saltonstall* and *Proctor*, for the plaintiff. The legacy of the twenty-seven shares was a bequest of so much stock in a particular fund, and a direction to the executor to purchase stock to that amount, if it were not found among the assets. Toller, 303; *Partridge* v. *Partridge*, Cas. Temp. Talb. 226.

It was not a specific legacy of the shares in the Beverly bank owned by the testator at the time of making his will. *Chaworth* v. *Beech*, 4 Ves. 565; *Walton* v. *Walton*, 7 Johns. Ch. R. 258; *Bronsdon* v. *Winter*, Ambl. 57; *Hambling* v. *Lister*, ibid. 401; *Sleech* v. *Thorington*, 2 Ves. sen. 563; *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108; *Penticost* v. *Ley*, 2 Jac. & Walk. 207; *Purse* v. *Snaplin*, 1 Atk. 414, and

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note ; *Coleman* v. *Coleman*, 2 Ves. jun. 640 ; *Gillaume* v. *Adderley*, 15 Ves. 384 ; *Mann* v. *Copland*, 2 Madd. R. 223 ; 2 Madd. Ch. Pr. 10 ; *Att. Gen.* v. *Parkin*, Ambl. 566.

The sale of the shares was not an ademption of the legacy. If the legacy was not specific, of course there was no ademption. But if it was specific, then the question is, what was the intention of the testator in making the sale ; and the circumstances of the case show that it was made, not to revoke the legacy, but to meet the testator's necessities. Swinb. 524 ; 2 Bro. C. C. 108 ; *Drinkwater* v. *Falconer*, 2 Ves. sen. 624 ; *Wood* v. *Penoyre*, 13 Ves. 336 ; 2 Madd. Ch. Pr. 93.

The only doubt in the case arises from the sale, and the burden of proof is on the defendant to show that thereby the testator intended an ademption. The authorities are clear, that it is only a question of intention. 7 Johns. Ch. R. 258 ; 3 Stark. Ev. 1715 ; *Pawlett's Case*, T. Raym. 335 ; *Avelyn* v. *Ward*, 1 Ves. sen. 420 ; *Bibb* v. *Thomas*, 2 W. Bl. 1043 ; *Swift* v. *Roberts*, 3 Burr. 1491 ; *Saville* v. *Blacket*, 1 P. Wms. 778 ; *Thomond* v *Suffolk*, ibid. 464.

Merrill and *Choate*, *contrà*. The bequest was an individual legacy, and was adeemed *pro tanto* by the sale of the shares. *Purse* v. *Snaplin*, 1 Atk. 414, 417 ; 2 Madd. Ch. Pr. 8, 9, 10, 89 ; Toller, 301, 331 ; 7 Johns. Ch. R. 262 , 2 Fonbl. 369, and notes ; *Hinton* v. *Pinke*, 1 P. Wms. 540 ; *Rider* v. *Wager*, 2 P. Wms. 328 ; *Lawson* v. *Stitch*, 1 Atk 508 ; *Heath* v. *Perry*, 3 Atk. 103 ; *Chaworth* v. *Beech*, 4 Ves. 566 ; *Innes* v. *Johnson*, ibid. 569 ; *Fryer* v. *Morris*, 9 Ves. 360 ; *Gillaume* v. *Adderley*, 15 Ves. 384 ; *Jeffreys* v. *Jeffreys*, 3 Atk. 120 ; *Selwood* v. *Mildmay*, 3 Ves. 306 ; *Barton* v. *Cooke*, 5 Ves. 461 ; *Sibley* v. *Perry*, 7 Ves. 529 ; 3 Wooddes. 535 ; *Long* v. *Short*, 1 P. Wms. 403 ; *Raymond* v. *Broadbelt*, 5 Ves. 199 ; *Ashton* v. *Ashton*, 3 P. Wms. 384 ; *Barker* v. *Rayner*, 5 Madd. R. 217. There is nothing in the circumstances of the sale to prevent it from operating as an ademption. The law infers an intent to adeem, from the subject of the bequest being destroyed. It is not necessary to prove that the testator passed a judgment definitively upon the question whether he would adeem, or that

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he should even know in what manner the sale would operate upon the bequest. *Stanley* v. *Potter*, 2 Cox, 180; 2 Stark. Ev. 739; 4 Ves. 574; 9 Ves. 360.

WILDE J. delivered the opinion of the Court. [After stating the nature and subject of the action.] It is agreed, that at the time of making the will (January 30th, 1818) the testator was the owner of the exact amount of stock bequeathed to the school district, in the several corporations named in the will; and that afterwards, on the 13th day of November, 1823, he sold and transferred his shares in the Beverly bank; so that the general question is, whether this sale was an ademption of the legacy *pro tanto*.

The case has been very fully and ably argued, and many cases have been cited, some of which appear to clash, though most of them, we think, may on close examination be satisfactorily reconciled. Perhaps no two cases can be found exactly similar, and small circumstances may lead to decisions apparently contradictory. I shall not go over all these cases, for in questions relating to the construction of wills, the mind is often perplexed and misled, rather than instructed, by a multiplicity of cases; especially when the question is as to the intention of the testator. The first question to be considered is, whether the legacy demanded is specific or general. If the object of the testator was to give the identical stock specified in the will, then the sale of a part would be proof of *animus revocandi*, and would amount to an ademption of the legacy *pro tanto*.

The general rule is, that if stock be bequeathed, and the testator owns the stock described, at the time of making the will, the bequest must be considered specific. *Selwood* v. *Mildmay*, 3 Ves. 310.

There is a strong case in Atkyns in support of this rule, which has a close resemblance to the case under consideration. In that case (*Jeffreys* v. *Jeffreys*, 3 Atk. 120) the testator had given to his daughters 2702*l.* 3*s.* capital stock in the bank of England; and 2000*l.* capital stock in the English East India Company. At the time of making his will he had the exact amount of bank and India stock bequeathed to his daughters, but before his death he sold out a part of

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his bank stock (702*l.* 3*s.*), and it was held that this sale of the bank stock was an ademption *pro tanto*. The master of the rolls makes a distinction, which seems very just, between a bequest of goods perishable in their nature, and that of durable property, as stock and the like. So also the circumstance, that the stock bequeathed and the stock the testator owned at the time exactly agreed, is much relied on as strong proof of the specific quality of the legacy.

In the case of *Ashburner* v. *M'Guire*, 2 Bro. Ch. Rep. 108, the words of the bequest were, "I bequeath to W. B. my capital stock of 1000*l.* in the India Company's stock." The testator, at the time of making his will, was possessed of 1000*l.* East India stock, and no more. This stock he sold out before his death, and Lord *Thurlow* held that the legacy was specific and was adeemed by the sale.

In the case of *Badrick* v. *Stevens*, 3 Bro. Ch. R. 431, the testatrix bequeathed several sums of money to be paid out of a bond debt then due. The obligor in the bond paid the debt in the lifetime of the testatrix, and it was held that the legacies were thereby adeemed.

So in the case of *Innes* v. *Johnson*, 4 Ves. 569, the bequest was to the testator's sister, of the full interest of 300*l.* upon bond during her life; and after her decease the interest on the said bond was given to her daughter. The testator had, at the time of making his will, a bond against the husband and son of the legatee, for 300*l.*, also one for 200*l.*, and divers other bonds against other persons. It was contended that this was a legacy of money, with reference to a particular fund, or a demonstrative legacy. But the master of the rolls held it a specific legacy of the interest on the bond for 300*l.*

In the case of *Fryer* v. *Morris*, 9 Ves. 360, E. I. bequeathed to C. P. such money as her executors should, after her death, receive on a note for 400*l.* And a short time before her death the note was paid, and the amount was by her deposited with a banker with whom she had no other money, where it remained at her death, except 10*l.* which she drew out. Sir *William Grant* held that the payment of the note was an ademption of the legacy.

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These are strong cases to show that the legacy in question is specific and was adeemed as to the shares in the Beverly bank. But there are other cases, which seem to have been decided upon different principles.

In *Pawlet's Case*, T. Raym. 335, where the testator had given to his niece 500*l.* in the hands of his sister, the Lady Cholmeley, and due to him on her bond, it was held that the legacy was not adeemed, although the Lady Cholmeley had paid the bond during the lifetime of the testator, on the ground that it was not a specific legacy. So Lord *Camden* held, in the case of the *Att. Gen.* v. *Parkin*, Ambl. 566, that if a sum of money be given due on a bond, the legacy is not specific. But this decision is denied to be law by Lord *Thurlow*, after very full deliberation, in the case of *Ashburner* v. *M'Guire*, already cited. It is however remarked by the lord chancellor in the case of *Coleman* v. *Coleman*, 2 Ves. jun. 639, (and the master of the rolls in the case of *Chaworth* v. *Beech*, 4 Ves. 556, seems to be of the same opinion,) that Lord *Camden* proceeded on the supposition, that the testator did not mean to refer to any particular bond or security, but that he intended to give the sum specified in the will out of any bond or security he might happen to have. And if so, it is said the case of the *Att. Gen.* v. *Parkin* may be sustained; otherwise it must be considered as overruled by the case of *Ashburner* v. *M'Guire*. The master of the rolls refers also to the case of *Lord Castleton* and *Lord Fanshaw*, 1 Eq. Cas. Abr. 298, in support of the case of *Ashburner* v. *M'Guire*, which he says is an authority conclusive on the subject. It must, however, be admitted, that the distinctions which have been made, in some of the cases, between a specific legacy, and a pecuniary legacy payable out of a particular fund, are extremely nice.

In the case of *Rider* v. *Wager*, 2 P. Wms. 328, the question arose on the will of admiral Littleton, who among other things gave to the second son of Sir Harcourt Masters 500*l.*, part of the money owing to him by Sir Harcourt; and the residue of the debt was given to his younger children. The legacy of 500*l.* was considered as a pecuniary or demonstrative legacy, while that of the residuum to the

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younger children was held to be specific. This case appears to have been decided upon a distinction similar to the one taken by Lord *Camden*, between a legacy of a debt generally, and that of a certain sum due from a particular person, a distinction which Lord *Thurlow* thinks too slender for the basis of a decision.

In the case of *Orme* v. *Smith*, 1 Eq. Ca. Abr. 302, the words of the will are, "I give and devise to A. my good and only uncle, the sum of 500*l.*, that is to say, that bond and judgment he gave me for 400*l.* and 100*l.* in money." The uncle some time after sold an estate and paid off 320*l.* and took up the bond and gave a new bond for the remaining 80*l.*, and some time after the testator died. The uncle brought his bill for the legacy of 500*l.*, and the lord keeper decreed that the bond for the 80*l.* should be delivered up and the residue of the legacy should be paid. The counsel for the plaintiff laid hold of the distinction between voluntary and compulsory payments, which has long since been exploded. But whether the court went upon that ground, or upon the authority of *Pawlet's* case, does not distinctly appear. This case however and *Pawlet's* case are both relied on in the case of *Ford* v. *Fleming*, 2 P. Wms. 470. In that case A. by her will gave her granddaughter Mary Ford 40*l.* out of a debt due to the testatrix from J. S. for rent; and the residue of the rent due was given to her grandson. After making the will the testatrix sued for these arrears of rent and received them. And it was held, that this was no ademption of the legacy, because the testatrix's suing for the rent might have been occasioned by her apprehension that the debt was in danger. It was said by counsel, *arguendo*, that this legacy being 40*l.*, could not be called a specific legacy, but was a gift of so much money, and that the rent was referred to as a fund for the payment of the legacy. And unless this case and *Pawlet's* case, and that of *Orme* v. *Smith*, can be sustained on this ground, I think they are manifestly opposed to very many later authorities.

The case of *Coleman* v. *Coleman*, 2 Ves. jun. 639, was decided on peculiar circumstances. In that case the testator gave the interest of a particular bill of exchange to his

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White, Judge, &c. v. Winchester.

wife for life, and directed that after her death the bill should be sold, and the proceeds of sale divided among certain persons named in the will. It appeared that this bill was the bulk of the testator's fortune. It was paid to the testator after he had made his will, in the usual course in which the company paid such bills in rotation; and it was held, that the legacy was not thereby adeemed. But this case was decided on the manifest intention of the testator, and not on the distinction between specific and pecuniary legacies.

Whether these, and other cases, can be fully reconciled or not, they certainly all agree as to one point, namely, that when the question is, whether a legacy is specific or pecuniary, it must be decided by the apparent intention of the testator. Now when one by his will gives a certain amount of stock, or the income of stock, in a particular bank, or other corporation, and at the time of making the will, he is owner of the exact amount of stock given, the presumption is strong, that he intended to give the stock of which he was the owner. Such is the case under consideration. The testator was the owner of the exact amount of stock described in the will, and we must understand, nothing in the language of the will appearing to the contrary, that it was the income of this particular stock which he intended to appropriate for the use of schools. The provision made in case either of the companies should be dissolved, confirms this construction, and there is nothing in the language of any part of the will which renders it doubtful. This legacy therefore must be considered as specific and not pecuniary.[1]

But it has been argued, that if it is so considered, there is nothing in the case to indicate an intention on the part of the testator to adeem the legacy. It is however clearly settled, that the alienation of a specific legacy is presumptive proof, and it is strong proof, of an intention to adeem. It is for the plaintiff to show circumstances sufficient to repel this legal presumption, and certainly no such circumstances appear.

[1] See Ram on Assets, &c. 383 to 387, (No. 23 Law Libr. 254 to 256,) and cases there cited; Toller on Executors, (4th Am. ed.) 301 to 314; *Walton* v. *Walton*, 7 Johns. Ch. R. 258; *Cuthbert* v. *Cuthbert*, 3 Yeates, 486.

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The same considerations which induced the testator to alienate a portion of his stock, might have induced him also to diminish his bounty to the school district; and his suffering his will to stand unaltered after the sale of the Beverly bank stock, is a circumstance tending to strengthen this supposition. Upon the whole, therefore, we are of opinion that the sale of the Beverly bank stock is a sufficient indication of the testator's intention to adeem the legacy *pro tanto*; and that the other facts in the case do not repel the legal presumption arising from this circumstance.[1]

Plaintiff nonsuit.

Dudley Adams *versus* Billy Emerson.

The owner of the soil over which a turnpike road is laid out, may maintain trespass against the servant of the corporation for taking the herbage.

Trespass *quare clausum fregit.* At the trial it was proved, that the plaintiff owned the *locus in quo*, and that the Newburyport turnpike road was laid out over it. Before the road was constructed, the soil of the *locus in quo* consisted of marsh land, and the travelled part of the road was made by cutting up the sods of the contiguous marsh land on either side, the travelled part being raised and separated from the marsh on each side, by a railing, so that no traveller can pass upon the *locus in quo*. The parts of the marsh land out of which the sods were so taken, afterwards produced crops of thatch; and the defendant, as the servant of the turnpike corporation, cut and carried away the thatch. If it belonged to the corporation, the plaintiff was to be nonsuited; if to the plaintiff, the defendant was to be defaulted.

Marston, for the plaintiff, cited *Perley* v. *Chandler*, 6 Mass. R. 454; *Commonwealth* v. *Peters*, 2 Mass. R. 125; *Fairfield* v. *Williams*, 4 Mass. R. 427; *Tippetts* v. *Walker*, ibid. 595; *Alden* v. *Murdock*, 13 Mass. R. 257; *Stackpole* *Nov* 10th.

[1] See Fonbl. Eq. (3d Am. ed.) 597 to 599; Toller on Executors, 330 to 334; *Walton* v. *Walton*, 7 Johns. Ch. R. 262; *Cogdell* v. *Cogdell*, 3 Desaus. 384, 2 Williams on Executors 820 to 827.

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v. *Healy*, 16 Mass. R. 33; *Tucker* v. *Bass*, 5 Mass. R. 164; *Robbins* v. *Borman*, 1 Pick. 122; *Goodtitle* v. *Alker*, 1 Burr. 133; *St.* 1804, *c.* 125, § 15.

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Cushing, for the defendant. In the cases cited the question was between the owner of the soil and the public; the nature of the easement possessed by a turnpike corporation was not considered. It is not an easement of passage, but it is a right to cut up and carry away the surface of the soil for the purpose of making the road and keeping it in repair; and whether repairs are made with the sods themselves, or the proceeds of the sods, can make no difference. The owner of the soil received a compensation for the whole surface, in the damages allowed him when the road was laid out. The doctrine of servitudes in the civil law confirms this view of the case. *Jackson* v. *Hathaway*, 15 Johns. R. 447, and authorities there cited; *Peck* v. *Smith*, 1 Connect. R. 103; *Rex* v. *Llandilo Roads*, 2 T. R. 234; *Ball* v. *Herbert*, 3 T. R. 253; *Harrison* v. *Parker*, 6 East, 154; *Clap* v. *Draper*, 4 Mass. R. 266; Domat's Civil Law, *bk.* 1, *tit.* 12.

If the corporation is not the sole owner of the property taken, it has at least a right in common with the plaintiff, and so trespass will not lie. *Welden* v. *Bridgewater*, Cro. Eliz. 421; *Wilson* v. *Macreth*, 3 Burr. 1824.

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WILDE J. delivered the opinion of the Court. We consider this a very clear case. The *locus in quo*, although part of a turnpike road, is the soil and freehold of the plaintiff. He has the exclusive right of property in the land; subject however to the easement or rights incident to a public highway; such as the right of passage over it, and the right which the turnpike corporation has to construct a convenient pathway, and to keep it always in good repair. To accomplish these purposes the corporation may dig up and remove from place to place, within the limits laid out for the road, any earth, sand and gravel, and may dig or cut up sods and turf;[1]

[1] So it may cause a dwellinghouse to be erected for the toll-gatherer, and trees to be cut down, and a cellar and a well to be dug, for the accommodation of the house, within these limits. *Tucker* v. *Tower*, 9 Pick. 109.

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but it by no means follows that the corporation has the right of herbage, which is the exclusive property of the owner of the soil, as well as all trees, mines, &c.

The corporation has no right of property in the land, but only a servitude or easement; and this does not clash with the plaintiff's exclusive right of property in the land;[2] so that there is no pretence for saying that the plaintiff and the corporation are tenants in common.

It was once doubted whether ejectment or other real action would lie for the soil of a road or highway, because, it was said, full seisin could not be delivered; and a dictum of Lord *Hardwicke* was quoted to that effect, in the case of *Goodtitle* v. *Alker et al.* 1 Burr. 133; but that doubt was removed by the decision in that case; and very clearly it had no foundation in principle. And it was never doubted that the owner of the soil over which a highway was laid, could maintain trespass for an injury done to the soil. 59

These principles are well settled by all the authorities, and it is very clear that the plaintiff is entitled to recover.[1] The defendant, therefore, according to the agreement of the parties, must be called.

Defendant defaulted.

Reuben Jones *versus* The Inhabitants of Andover.

In *St.* 1786, *c.* 81, § 7, giving double damages for an injury received through a defect in any highway, the term *highway* includes *town-way*.[3]

This was an action of the case, founded upon *St.* 1786, *c.* 81, § 7, to recover double damages for an injury sustained by the plaintiff, by reason of a certain highway in Andover

[2] See 3 Kent's Comm. (3d ed.) 432, 433; *Tucker* v. *Tower*, 9 Pick. 111, *Tyler* v *Hammond*, 11 Pick. 214; *United States* v. *Harris*, 1 Sumner, 37.

[1] See 3 Kent's Comm. (3d ed.) 432, 433, note *a*, and cases there cited; *Robbins* v. *Borman*, 1 Pick. (2d ed.) 123, note 1, and cases there referred to; *Chambers* v *Furry*, 1 Yeates, 169; *Hart* v. *Chalker*, 5 Connect. R. 311; 1 Chitty on Pl. (6th Am. ed.) 200.

[3] In the enactment on this subject in the Revised Statutes *town-ways* are expressly named. *c.* 25, § 22.

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being suffered to be out of repair and encumbered by a large stone.

At the trial it appeared, that the way was a town-way, laid out by the selectmen of Andover, and accepted by the inhabitants of the town.

The defendants contended that an action does not lie upon the statute for an injury sustained in a town-way. By consent of parties a nonsuit was directed, subject to the opinion of the whole Court.

Nov. 10*th.* 1786, *c.* 81, § 1, 3, 7, 10, 11; *St.* 1787, *c.* 17, § 1; Vin. Abr. *Chimin Common, A, pl.* 3, 4; *Craigie* v. *Mellen*, 6 Mass. R. 7; *Commonwealth* v. *Newbury*, 2 Pick. 57; *Commonwealth* v. *Low*, 3 Pick. 408; *Todd* v. *Rome*, 2 Greenl. 55; 1 Hawk. P. C. *c.* 76, § 1; *Rex* v. *Hamond*, 1 Str. 44; *Regina* v. *Sainthill*, 2 Ld. Raym. 1174.

Saltonstall and *S. Merrill*, for the plaintiff, referred to *St.*

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Choate, contrà, cited *Mower* v. *Leicester*, 9 Mass. R. 247; *Riddle* v. *Merrimack Locks*, &c. 7 Mass. R. 187; Ancient Chart. &c. 269; *St.* 1786, *c.* 81, § 1, 2, 3, 4, 5, 6, 8; *St.* 1786, *c.* 67, § 7.

The opinion of the Court was drawn up by

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Parker C. J. The question in this case turns upon the construction of the 7th section of the statute of 1786, *c.* 81, which provides, that if any person shall lose a limb, &c. or receive injury in his property "through any defect, or want of necessary repair and amendment of any highway, causeway, or bridge, the person injured thereby shall and may recover of the county, town, the person or persons who are by law obliged to keep the same highway, causeway, or bridge in repair, in case they had reasonable notice of the defect, double the damages thereby sustained."

The declaration sets out, that the injury complained of happened through defect of a highway in the town of Andover. It appeared in evidence, that the place where, &c. was a town-way, laid out pursuant to law by the selectmen, and accepted by the inhabitants of Andover. It is contended that such way is not a highway within the meaning of the statute; and therefore that this action is not given by the statute. If in the section above cited the word *highway* is used by

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the legislature in a strictly technical sense, *viz.* as a public way laid out under the authority of the Court of Sessions, then the case is not within the statute; if in a mere popular sense as a road or way generally, then the remedy given will apply to damage happening from defects in any way, whether it be a public highway, a county road, a town-way, which is sometimes in the statute called a private way, or a private way *technically*, which is a way established by law for the particular benefit or accommodation of individuals, such as lead from a county or town road to the farms or dwellinghouses of private individuals, and which are to be maintained and kept in repair by those for whose accommodation they were established; for by the statute of 1786 this latter species of way is put much upon the same footing in regard to repairs, and the liabilities of those who are bound to maintain them, as the two other kinds of ways. 61

It is true that in the preceding sections of the statute, and in another chapter of the statute of 1786, *viz.* c. 67, there seems to be a distinction kept up between the terms *highway* and *town-way*, the first usually designating a county road, or what may be properly called a public highway, which is laid out for the benefit of the public at large. And yet the distinction is not maintained so precisely as to satisfy us, that in some instances where the term *highway* is used, it does not include town as well as county roads.

In the first section of the statute on which the action is brought, an instance occurs which proves this loose application of the term. In the enacting part of this section, both terms are used, *highways* and *town-ways*, and in the first proviso it is enacted, that the surveyors shall have power to remove obstructions, &c. from the highway or town-way, to dig up, cut down trees, &c. that may straiten or hinder the *highway* or *town-way*; also to dig for stone, gravel, clay, &c. in any land not planted or inclosed, and the materials thus dug up to remove to such place or places in the *highways*, for the repair and amendment thereof, &c. Without doubt this same authority to repair was intended to extend to *town-ways*, and yet it does not, unless they are included within the term *highways*. In the second proviso it is enacted, that no surveyor

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shall cause any water-course, occasioned by the wash of *any highway or town-way*, to be so conveyed by the side of *such highway* as to incommode any person's house or store, &c. Was it intended that this might be done in town-ways? If not, then town-ways, in this part of the statute, were included in the term *highways*.

Again, in the 3d section the terms *highways* and *town-ways* are used together almost throughout, in providing for the assessment of the tax, the manner of paying it, the duty of the surveyor, &c.; and yet at the close, it is required that the surveyor shall, at the expiration of his term, render to
62 the assessors a list of such persons as shall have been deficient in working out their *highway* rate, without mentioning town-ways as before.

In the 7th section of the statute itself, which gives the action, may be found strong reasons for supposing, that in the use of the term *highway* more was intended to be included than a public county road. First there is the same reason for a remedy in regard to damage happening in the one road as the other; in all other respects there is the same liability upon the same corporation. Then, it is clear, that if the damage happen from defect in a *causeway* or *bridge*, the remedy applies, although such causeway or bridge be in a town-way and not a county road, for the *county*, *town* or *person* who ought to keep it in repair, is made answerable for damages. This perhaps shows that the remedy is to be applied even in the case of a strictly private way, for in no other case can any person, other than the county or town, be obliged to keep them in repair. And further, although in the first branch of this section *highway* is the term used, yet in the latter branch it is provided, that if the life of any person shall be lost through the deficiency of the *way*, causeway, or bridge, there shall be a penalty.

We think, then, we are authorized to say, that the legislature, in providing a remedy suitable for all cases of damage happening from culpable neglect in parties obliged by law to maintain roads, did not use the term *highway* in the straitened sense supposed, which would leave the citizens without remedy, but in the general popular sense, including certainly

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town-ways, which, though of inferior importance to county roads, are yet public in their use, and may not improperly be termed highways.

The distinction between a highway and a private way in England is, that the former is the way to a market, a great road common to all passengers, &c.; Com. Dig. *Chimin*, *A* 1; and the latter is such as goes to a church, house, vill, or close, and is not common for all the king's subjects; or it may be like our private ways from a meadow or close to a street. Com. Dig. *Chimin*, *D* 1. Our town-ways are of an intermediate character. They are more public than private. All the citizens have a right to use them. They are the sub- 63
ject of indictment if out of repair. It is not surprising therefore that the legislature should treat them as *highways*.

The nonsuit taken off.[1]

MARY WADSWORTH *versus* JOHN RUGGLES, Executor of Benjamin Wadsworth.

Where a testator bequeathed to his wife, "all rents in arrear on her real estates," memorandums written and signed by him were admitted in evidence, to show that he included in those terms, not merely rents unpaid by the tenants, but all the money he had ever received for rent, or otherwise, belonging to his wife, with interest

ASSUMPSIT for a legacy of 663 dollars and 66 cents.

The last will of the Rev. Benjamin Wadsworth, dated August 1, 1825, contained, among others, the following provisions. "*First.* Knowing the full determination of my beloved wife Mary, from her own frequent declarations, not to live in Danvers after my decease, I make no provision for her accommodation in my dwellinghouse. I give, devise, and bequeath to her, instead of dower, all my interest and title in and to any part of the real estates of her father and mother, late deceased, lying in Lynn, for her use for ever, with as much of the provisions in my house as she may wish for, not exceeding one third, at the time of my decease. I also give

[1] See *Jones* v. *Andover*, 9 Pick. 146; *Bigelow* v. *Weston*, 3 Pick. (2d ed.) 269, note 1

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my said wife 1000 dollars, to be paid to her in six months after my decease, and also the dividends accruing during her life on twenty shares in the New England Bank in Boston, and on twenty shares in the Commercial Bank in Salem. I also give my wife all the household furniture and other articles she brought me at and about the time of our marriage, in their present state." — "*Seventhly*, I bequeath to my said wife the money she may have in her possession at the time of my decease, and all rents in arrear on the real estates at Lynn."

64 The parties agreed, that the testator and the plaintiff were married in 1805, and that she was then in possession of certain real estate in her own right. The testator kept an account of the rent and income of this estate, and of the expenditures upon it, and from time to time made and signed memorandums relating to the same, which were kept in an envelope, on which was written by the testator, "Mrs. Wadsworth's papers," in a desk to which the plaintiff had free access; and it was agreed, (if the Court should be of opinion that the same might be given in evidence,) that among the memorandums were the following, *viz* : —

One in which the testator, after reciting, that on June 23, 1808, an attorney at law had received of him two notes, one for 52 dollars and 69 cents, dated April 15, 1807, the other for 46 dollars and 85 cents, dated April 15, 1808, given to the testator by E. Curtis "for the rent of the place in Lynn," and that a suit had been commenced in the name of the attorney upon these notes, and execution obtained, but that only 15 dollars had been paid by Curtis, of which 7 dollars and 89 cents had been applied to the payment of costs, and the remaining 7 dollars and 11 cents had been paid to the testator, he adds, "which 7 dollars and 11 cents I have reckoned in my note to Mrs. Wadsworth, it being her property. And should any thing more ever be obtained of those two notes, I hereby testify that it belongs to Mrs. Wadsworth," &c.

Also a note given to the testator by Nathaniel Farrington, dated March 19, 1824, for 73 dollars and 84 cents, secured by a mortgage, and the following memorandum on the note.

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'This note with the mortgage I consider as Mrs. Wadsworth's, included in a clause of arrears in my last will. Attest, Benj. Wadsworth :" — which note and mortgage have been transferred to the plaintiff by the executor.

Also the following. "Oct. 11, 1825. Received 34 dollars and 10 cents of rent from Lynn, due to Mrs. Wadsworth, which are to be considered as offsets against Mr Thacher's deed to me, which is given to Mrs. Wadsworth in my will, and therefore, I am not accountable to her for said sum. B. Wadsworth :" — meaning in the above to set off the 34 dollars and 10 cents, against a like sum of his own money advanced to purchase the estate devised to her.

Also the following. "Danvers, April 1, 1824. Memorandum. The sum of 663 dollars, 66 cents, includes all the money I have ever received for rent or otherwise belonging to my wife Mary Wadsworth, with interest reckoned annually upon the several payments which unitedly compose said sum to this date, except what I have at her request and for her sole benefit paid to purchase for her Mr. Moulton's bid, so called, and N. and F. Carnes's right in her late father and mother's real estate in Lynn. Benj. Wadsworth." And under this the following was written by the testator. "Memorandum. The above sum of 663 dollars, 66 cents, is included in my will." If in the opinion of the Court the time when the memorandum was made should be material, it was to be ascertained by a jury or by auditors, as the Court might direct.

The testator died on the 18th of January, 1826. He had made two or three other wills previously, and revoked the same. His real estate was appraised at 3300 dollars, and his personal at 24,172.

If the Court were of opinion that the sum demanded (663 dollars and 66 cents) was bequeathed by the seventh clause of the will, the plaintiff was to recover judgment for that sum with interest; otherwise she was to become nonsuit.

The case was argued in writing.

Saltonstall, for the plaintiff. The question is, whether the sum of 663 dollars, 66 cents, mentioned in the memorandum, is included in the clause of *rents in arrear*, in the will.

It appears that the testator always kept an account with his

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wife, as he would have done with a stranger; and that he included in *rents in arrear* not merely the rent due from the tenants at the time of his decease, (which was less than 20 dollars,) but Farrington's note, &c. given for rent. He states in the memorandum, that he had received the sum of 663 dollars and 66 cents, for rent and otherwise, and adds, "the above sum is included in my will." In what part of the will is it included? We contend that the devise and bequest in the first clause are in lieu of dower, or if not
66 wholly so, that the 1000 dollars and the income of the bank shares are from his own property, as a provision for her support. It was his intention to give the sum in question, under the clause of "rents in arrear," &c. and he meant to include all the money he had received from her estate. It was in fact all for rent, except about 10 dollars. That he did not confine the terms "rents in arrear" to their technical meaning, is evident from the memorandum respecting Farrington's note.

In the case of a will, evidence is admissible to apply its terms to the proper objects, as to show what is comprehended within the description of the estate devised. 3 Stark. Ev. 1695, 1013, note 1, 1026; 2 Roberts on Wills, (2d ed.) 18, 23, 27. Here the ambiguity arises from something extrinsic, and the admission of evidence is to explain the ambiguity and the intention of the testator. *Sargent* v. *Towne*, 10 Mass. R. 303, [Rand's ed. *p.* 307, note (a).]

B. Merrill, for the defendant. The rules of evidence laid down as to latent ambiguities, are not applicable in the present case. To create such an ambiguity there must be a doubt as to the sense, or some uncertainty as to the signification of the words. If there is no such doubt or uncertainty, parol evidence is inadmissible. The terms "rents in arrear," both in a popular and legal acceptation, have a known, certain, and definite meaning. They mean *rents behind — unpaid — due from tenant to landlord* — relative terms, which are applied without ordinary propriety or precision when used as relative to husband and wife. The evidence offered is not for the purpose of showing the meaning of the words *rents in arrear*, or rather the amount of *rents in arrear on those*

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estates unpaid by the tenant, but to show that the testator intended to bequeath under those terms the 663 dollars, which were not rents in arrear. The admission of this testimony would be adding to the written language, by allowing us to say that a sum of money, the proceeds of *rents paid*, are *rents in arrear*. *Brown* v. *Selwin*, Cas. Temp. Talb. 240, 242, note; *S. C.* 4 Bro. P. C. 180; *Ulrich* v. *Litchfield*, 2 Atk. 372; *Jackson* v. *Sill*, 11 Johns. Rep. 213, 215; Roberts on Fr. 15; 3 Campb. 57, Howe's note; *Richards* v. *Dutch*, 8 Mass. Rep. 514; 3 Stark. Ev. 1008, 1010, 1011; [*Farrar* v. *Ayres*, 5 Pick. 409.]

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Even if the evidence offered by the plaintiff could be admitted, it would be inconsequential and barren. For, 1. it is vague, loose, and uncertain. 2. If the memorandums are regarded as testamentary papers, they are revoked by the will, being of prior date. 3. The plaintiff would contend, that the memorandum dated April 1, 1824, proves that the sum of 663 dollars is the sum bequeathed by the words "all rents in arrear on the estates in Lynn," when it cannot be overlooked, that the testator, in that memorandum, proceeds to describe that sum as including "all the money I have ever received for rent *or otherwise*, belonging to my wife M. W., with interest reckoned annually upon the several payments which *unitedly compose* said sum," &c. So that instead of proving that this sum is for rents in arrear, or for rents received, it proves the contrary. 4. The testator remarks, "the above sum of 663 dollars, 66 cents, is *included* in my will;" the meaning of which is, that in his will he had bequeathed to the plaintiff a sum equivalent; and it is immaterial whether these words were written by him before or after making his will of August 1, 1825; if written since, his meaning was, that the legacy of 1000 dollars included all the moneys he had ever received for her. 5. These memorandums by the testator were obviously intended as calculations, mere chalk, to satisfy and explain to his wife the extent of her pecuniary claims on him before he made his will. By the will he reimbursed all.

The opinion of the Court was drawn up by

PARKER C. J. The clause in the will under which the

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plaintiff claims 663 dollars and 66 cents as a legacy to her, is in the following words.—"Seventhly, I bequeath to my said wife the money she may have in her possession at the time of my decease, and all rents in arrear on the real estates at Lynn." If the Court can look dehors the will to ascertain what was intended by the testator by the words "all rents in arrear," &c. it would be very clear, by the memorandum on the envelope, indorsed "Mrs. Wadsworth's papers," dated April 1, 1824, that he intended to give the sum there specified as the proceeds of her real estate, the rent of which he had received; for in an additional memorandum he says, "the above sum of 663 dollars and 66 cents is included in my will." There being no date to this latter memorandum, it is to be presumed that it was made after the will, and was occasioned by some provision respecting rents made therein; and these words in the will, "all rents in arrear," &c. might reasonably be referred to the amount of rents of which the account is stated in the memorandum. And although the whole of the sum mentioned in the memorandum should not have been received by him specifically from rents, taking the will and the memorandum together, there could be no doubt he intended to give her that sum.

But it is insisted by the executor, that there is no ambiguity in the clause, and therefore we are not at liberty to seek for a construction dehors the will. *Rents in arrear on the real estates in Lynn*, are, it is said, perfectly definite words, and there being a trifling sum of rent due from the tenant, at the decease of the testator, it must be intended the clause related to that only. The position is true, and well supported by the authorities, that extrinsic matter is not to be resorted to, when the meaning of the testator can be come at in the will itself, or when the words used themselves constitute a legacy or devise, there being no uncertainty as to the person who is to take, or as to the thing bequeathed. We think, however, there is an ambiguity in the words used, which will justify an explanation by extrinsic matter, and particularly by the words used by the testator himself in memoranda written and signed by him. We are obliged to sup

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pose, in justice to the character of the testator, that he intended, in the clause in question, a bounty to his wife out of property belonging to himself. We presume also, from the scrupulous management of his wife's property, that he believed that all rents unpaid at the time of his death, accruing from real estate belonging to her, by law survived to her, and became her sole property, without any gift from him. That such is the law in the case of leasehold estates belonging to the wife, unless the rent was secured by a lease made by the husband alone with the tenant, in which it was 69 stipulated that the rent should be paid to him, is very clear. See Com. Dig. *Baron and Feme*, *F* 1, and the cases there cited; also 1 Roper's Husband and Wife, 170, *et seq.*; Chamber on Leases, 221; and it is quite likely Mr. Wadsworth supposed the law to be the same in regard to his interest in his wife's estate. By the bequest then of rents in arrear on the estate in Lynn, which was her property, he could not have intended rents unpaid by the tenant, for we ought not to suppose he made a pretence of giving to her, what he had reason to think was already hers. What then did he mean by rents in arrear? He has himself explained it, and very satisfactorily. He had received rent during the coverture from her real estate. This he had a right to do, and to appropriate to his own use; but he kept an exact account with his wife, meaning conscientiously to restore all which he thought belonged equitably to her, though legally to him, and this he intended to do by his last will, and this he did. He gives her all the money in her possession at the time of his decease, and all the rents in arrear on the real estates at Lynn. By rents in arrear he meant the sums he had received and kept an account of, as belonging equitably to his wife; rent in arrear to her, which he had not paid her, but kept on hand for her; and he further says, "the above sum is included in my will." How is it included, unless in the clause giving her the rents in arrear? It is supposed by the defendant's counsel, that it is included in the legacy of 1000 dollars; but on recurring to the clause giving that legacy, and the other provisions made for her out of his personal estate, it is manifest he considered all this an equiv-

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dent for the legal claims she might have for a sufficient provision in his real estate in the form of dower.

That the testator used the words "rents in arrear" in an untechnical and inartificial manner, is evident from the memorandum in relation to a note given by Nathaniel Farrington, March 19, 1824, secured by a mortgage. The memorandum is, "This note, with the mortgage, I consider as Mrs.
70 Wadsworth's, included in a clause of arrears in my last will." There is no clause in the will which contains the word *arrears*, except the one under consideration, and it was necessary to look dehors the will to ascertain what was meant by the terms, *rents in arrear*, on this subject. The testator certainly meant that this note should go to his wife, and so the executor considered it, for he has delivered it to her. Why then should not the money which he kept an account of as accruing from rents, pass to her in the same clause, when he says, at the foot of the memorandum, "the above sum is included in my will"?

If it be said, that the devise to her in the first clause of the will, of all his right and interest in the real estate of her father and mother, shows that he did not understand the rules of property, and therefore that he intended to give her only what was already hers, under the phrase *rents in arrear*, it is a sufficient answer, that he appears to have had some interest in that real estate, purchased of Thacher, which was the object of that devise. We are satisfied, therefore, that it is right to look into these memoranda, in order to find out the meaning of the terms *rents in arrear*, for the reasons above stated; and that by those words he meant to give her the sum included in the memorandum, as the amount received as rents on her estate.[1]

Defendant defaulted.

[1] See 2 Stark. Ev. (5th Am. ed) 558 to 561 and note 1; 3 Harr. Dig 2205.

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SAMUEL AYER *versus* BAILEY BARTLETT, Sheriff, &c.

Where the owner of real and personal estate gave a bond with condition that he would convey the same to the obligee, when certain negotiable notes given for the consideration should be paid, and that the obligee should have the possession and enjoyment of the property so long as he should continue to pay the notes as they became due and no longer, and possession was delivered immediately, pursuant to the bond, it was held that the transaction was not fraudulent *per se* as against the creditors of the obligee.

Such possession and use, though they might induce persons to trust the obligee under the belief that he was the owner of the property, yet, if not permitted with a fraudulent design to obtain credit for him, would not render the property liable for his debts.

TROVER for machinery, goods and chattels. Trial before *Putnam* J.

It was admitted that the plaintiff was once the owner of the property. Moody Bridges, a deputy of the defendant, and for whose alleged default this action was brought, attached it on several writs as the property of William Scholfield, and the defendant contended that the plaintiff had sold and disposed of it in such manner as to render it liable to Scolfield's creditors.

It was proved that the machinery belonged to a cotton factory in Andover, and that the plaintiff gave Scholfield possession of the real estate or factory by turf, &c. and permitted him to enter and have the actual possession of the machinery, &c. Scholfield then made such alterations as his convenience required, put up new lathes instead of the old ones, and made alterations in the looms, and in other respects managed as if he had been the owner of the property. He sold some of it, and received the payment for it.

Evidence was produced of declarations of the plaintiff to different witnesses, at different times, that he had sold the factory, machinery, &c. to Scholfield. These declarations were objected to on the part of the plaintiff as incompetent evidence, but were admitted; and his counsel then undertook to explain them in this way, *viz.* that there had not been an actual sale, but an agreement for a sale, accompanied indeed with immediate possession, but without any change 72

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of property. And they proved by Hobart Clark, Esq., that the plaintiff and Scholfield together consulted him, and finally agreed that the plaintiff should give a bond to Scholfield to convey the factory, &c. A bond was accordingly given, dated August 13, 1824, by the plaintiff as principal and one Adams as surety, in the penal sum of 18,000 dollars. The condition was, that whereas Ayer "has agreed to sell and convey" to Scholfield, a woollen factory, &c. for the sum of 9000 dollars, to be paid by instalments, the first of which was payable on the 1st of February, 1825, and the last on the first of April, 1828, with interest to be paid annually, according to the tenor of certain negotiable promissory notes given by Scolfield to Ayer, of even date with the bond; "and whereas it is agreed that the said Scholfield shall enter, improve and occupy the said real estate with all the machinery and other property belonging to the factory, dye-house, and gristmill, &c. and have quiet possession and enjoyment thereof so long as he shall continue to pay his said promissory notes as the payments become due, and no longer; — now if the said Ayer, &c. shall permit and suffer the said Scholfield, &c peaceably and quietly to enter, improve, occupy and enjoy all the estate and property above mentioned, according to the terms and conditions aforesaid, without any manner of let, suit, trouble, &c. and if the said Ayer, &c. shall make, execute and deliver to said Scholfield, &c. a good warrantee deed of all the aforementioned estate and property, free and clear from all incumbrances, so soon as can be accomplished after all the aforesaid notes are paid, then this obligation to be void," &c. It was then argued by the plaintiff's counsel, that after the agreement had been executed and possession had been given in virtue of its provisions and conditions, it was in a popular sense true, that the plaintiff had sold out the factory, &c. to Scholfield, and it could not be expected that the plaintiff would have told the great number of people to whom he mentioned the sale, the particular terms and conditions attending the same.

73 The counsel for the plaintiff offered to inquire of a witness, whether it was not understood in the neighbourhood that the plaintiff had given only a bond, and not an actual conveyance

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of the property. This was objected to and not permitted. But the plaintiff was permitted to prove, if he could, that any of the attaching creditors knew the situation of the property; and evidence was introduced tending to show that Bridges, the deputy sheriff, and some of the creditors, were acquainted, before the suits were commenced, with the terms of the contract beween the plaintiff and Scholfield.

It was contended on the part of the defendant, that the plaintiff was estopped, in regard to the attaching creditors, from saying that he had not sold the property, or that it was not Scholfield's.

The jury were instructed, among other things, that if, from the evidence, they were satisfied that the plaintiff had delivered the goods to Scholfield, and permitted him to have them in such manner as induced the attaching creditors to give him a false credit, and that they trusted him upon the belief which the plaintiff had caused them to have, that the machinery at the factory belonged to Scholfield, their verdict should be for the defendant, notwithstanding, as between the plaintiff and Scholfield, the latter (not having performed the conditions) could not have compelled the former to execute a conveyance according to the bond; — that if the attaching creditors knew the situation of the property, and that only a bond for a conveyance, and not an actual conveyance, had been given, they could not recover on the ground of the plaintiff's having permitted Scholfield to have the possession of the property, and if the jury should be of opinion that the creditors had such knowledge, their verdict should be for the plaintiff, unless they were satisfied that the bond and agreement were not *bonâ fide*, but made with intent to defraud creditors; — and that as to those persons who trusted, knowing the situation of the property, no false credit could be said to have been held out.

The jury found a verdict for the plaintiff for 18 dollars damages for one article, which had been only lent to Scholfield, but in regard to all the other articles mentioned in the writ they found the defendant not guilty. The plaintiff moved for a new trial.

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Pickering and *Saltonstall*, in support of the motion, said there was no evidence that the plaintiff told any creditor of

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Scholfield, that he had sold the chattels in controversy, or that any person to whom he made such a declaration had repeated it to a creditor, so that if any false credit was given, it must have been from general reputation that Scholfield owned the property; the evidence, therefore, which was offered, to show that it was generally understood that the sale was not to be completed until after the performance of a condition, ought to have been admitted, to rebut the presumption that the creditors had been deceived. Scholfield's possession and apparent ownership were consistent with the written contract, and the declarations of the plaintiff were capable of explanation; and although Scholfield had the chattels in such a manner as induced persons to give him a false credit, yet if the plaintiff did not permit it with a fraudulent design, the property was not liable for Scholfield's debts. 2 Stark. Ev. 181; 1 Barn. & Ald. 335; *Lingard* v. *Messiter*, 1 Barn. & Cressw. 308; *Lingham* v. *Biggs*, 1 Bos. & Pul. 88; *Walker* v. *Burnell*, 1 Doug. 317; *Edwards* v. *Harben*, 2 T. R. 596; *Badlam* v. *Tucker*, 1 Pick. 398; *Bartlett* v. *Williams*, ibid. 288; *Barrett* v. *Pritchard*, 2 Pick. 512; *Marston* v. *Baldwin*, 17 Mass. R. 606; *Palmer* v. *Hand*, 13 Johns. R. 434; *Dawson* v. *Wood*, 3 Taunt. 256; 2 Kent's Comm. 410; *Meggott* v. *Mills*, 1 Ld. Raym. 286; *Leonard* v. *Baker*, 1 Maule & Selw. 251.

Cummins and *Spaulding*, *contrà*, contended that a contract respecting personal property like the one attempted to be set up, could not be supported by law; that it would lock up the property for four years from the creditors both of the plaintiff and Scholfield, and must be considered fraudulent as against the creditors of Scholfield. But even if there was no fraud on the part of the plaintiff, yet as he had said that the property was Scholfield's, and had permitted him to treat it as such, he was estopped to deny that Scholfield was the absolute owner. Nearly all the debts of the attaching creditors were contracted after Scholfield came into possession of the property. 2 Stark. Ev. 28, 32; *Davis* v. *Spooner*, 3 Pick. 288; *Aveson* v. *Kinnaird*, 6 East, 188; *Milford* v. *Bellingham*, 16 Mass. R. 109; *Lingham* v. *Biggs*, 1 Bos. & Pul. 87; *Darby* v. *Smith*, 8 T. R. 82; 1 Pick. 295, 388; Rob. Fr.

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Conv. 547; *Worseley* v. *De Mattos*, 1 Burr. 467; *Gale* v. *Ward*, 14 Mass. R. 352; *Hussey* v. *Thornton*, 4 Mass. R. 407.

The opinion of the Court was drawn up by

PARKER C. J. The property which is the subject of this suit, it is agreed, once belonged to the plaintiff; but it is supposed by the defendant, that it was either transferred by him to Scholfield the debtor, or that it was permitted by the plaintiff to be so used and possessed by Scholfield as to give his creditors the right to attach and hold it to satisfy their debts.

There is no evidence of any actual sale to Scholfield, but there was an agreement to sell, the consideration was fixed, and negotiable notes payable at future periods were given by Scholfield to the plaintiff, and Scholfield was put into possession of the whole subject of the contract, real estate and machinery, and used them as his own. The terms of the contract are expressed in the bond given by the plaintiff to Scholfield.

It is very clear that this transaction did not amount to a transfer of the property to Scholfield. It was merely a contract to sell and convey, and the title as between the two parties was retained in the plaintiff, and intended to be so, until the conditions should be performed by Scholfield.

This species of contract was probably chosen by the plaintiff as giving him the greatest security for the payment of the consideration, though without doubt a conveyance from him, with a mortgage from Scholfield, as real estate was the principal subject, and the machinery might well have been so secured, would have been more free from difficulty.

Had the bargain been completed by a conveyance and mortgage, it cannot be doubted that the plaintiff would have had a lien upon all the property, until all the consideration was paid. The creditors of Scholfield might then have resorted to the equity of redemption, and the rights of all would have been taken care of to the extent of the value of the property.

In the mode adopted the creditors are put to great disadvantage, there being no title in Scholfield of which they can

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avail themselves at law, even if the greater part of the consideration should have been paid by him. This renders such contracts objects of jealousy, and they certainly ought to be critically scrutinized, for they afford a most convenient screen for fraud between the parties to the bargain. But they are not *per se* fraudulent. We have been accustomed to seeing bonds for the conveyance of real estate, the obligee giving notes for the consideration, he entering into possession and occupying the land, making payments from time to time, and yet gaining no title to the land. These bargains have been upholden at law, and chancery has power over them to compel an execution of the contract. *Proprietors of No. Six* v. *M'Farland*, 12 Mass. R. 327. It is likely that creditors may step in and avail themselves of chancery jurisdiction, upon offering to complete the payments, and obtain a conveyance of the land to them. And perhaps in the case before us, if the plaintiff shall have received so much of the consideration as shall leave a valuable property to Scholfield, his creditors may avail themselves of it through the power of a court of chancery ; but certainly not without paying the sum that is due to the plaintiff. We have spoken only of the nature of the contract, to show, that though inconvenient and embarrassing, it is not necessarily fraudulent.

The action seems to have proceeded on the ground, that although there was not in fact or intention, any actual sale or transfer to Scholfield, yet that his possession and use of the property being such as to lead those who would trust him, to believe that he was the owner, it became liable for his debts.

No such principle has been adopted in our law, nor in the English except under the *St.* 21 *Jac. c.* 19, supplemental to
77 the general bankrupt laws, and intended to give force and vigor to them. The provision is, that any goods &c. in the possession of the bankrupt, at the time of the act of bankruptcy, of which the order and disposition shall be in him, shall pass to the assignees as his property. This is a special provision making property admitted to belong to others, liable to the bankrupt's debts. It was enacted to avoid the litigation respecting property in possession of bankrupts, claimed by others under the common law principles, which were fre-

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quently abused. The same principle was contained in the bankrupt law of the United States which once existed. It was a harsh principle, but became innoxious when known to be the law, for people would be careful of so intrusting their property as to expose it.

It is only under the statute, and in case of bankruptcy, that the mere possession of another man's goods subjects them to seizure for his debts; and there is no principle of the common law, which will warrant it. If I lend my horse or other chattel to another to use as his own, neither he nor his creditors have a right to divest me of the property. Or if I should furnish the house of a friend for his convenience, with furniture purchased by myself, he never having had any property therein, his creditors could not take it from me, although from the use of it they supposed it belonged to him. Even where possession is considered as conclusive evidence of property, it is only where the person in possession had once been the owner. It is true that such acts are of a suspicious nature, and the possession and use may be strong evidence of property, but still it is only evidence, and the effect of it may be overcome by clear and decisive evidence of property in another.

It seems to us, that that part of the instruction to the jury, which authorized them to find for the defendant, "if they were satisfied that the plaintiff had delivered the goods to Scholfield and permitted him to have them in such manner as induced the attaching creditors to give a false credit to Scholfield, and that they trusted him upon the belief which the plaintiff had caused them to have, that the machinery at the factory belonged to Scholfield," was incorrect. If he did this with a fraudulent design to obtain credit for him, without 78
doubt the creditors would hold the property; but if he did nothing more than endeavour to keep the security in his own hands, he ought not to be prejudiced, although the creditors of Scholfield may have been deceived by the circumstances.

It appears to us therefore, that the true question in this cause is, whether the transactions between the plaintiff and Scholfield were *bonâ fide* or fraudulent. If there was in fact a sale, and the bond, instead of a transfer, was given to con-

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ceal the property from Scholfield's creditors, of course the attachment would hold: or if there was a design on the part of the plaintiff to make the property appear to belong to Scholfield, in order that he might obtain credit upon it — if his declarations were made with that view. But if he has conducted honestly in taking care of himself, and the declarations imputed to him were not fraudulently made, but were such as are natural and common to those who have agreed to sell, but have not actually legally transferred, all may be consistent with the nature of the original contract, and so not fraudulent or void.

The case chiefly relied on to support the defence, and which was particularly adverted to by the judge as the ground of his charge to the jury, is *Hussey et al.* v. *Thornton*, 4 Mass. R. 405. This case, so far as any thing was decided by the Court, determines that a conditional sale, accompanied by a delivery, does not transfer the property so as to make it liable to attachment by the creditors of the vendee, provided the delivery were conditional as well as the sale. Thus far it supports the view we have taken of the present case. But in concluding the opinion of the Court, the chief justice said, "Had the demands of these creditors originated while the goods were in the possession of Todd and Worthley (the vendees) so that it might be fairly presumed that a false credit was given to them, or had Todd and Worthley sold them *bonâ fide* for a valuable consideration, our opinion would have been otherwise." It is this expression which was relied upon at the trial. It cannot be said to be a decision, because it was upon a supposititious case. If such case had in fact been be-
79 fore the Court, the arguments of counsel and authorities might have produced a different opinion. It no doubt was founded upon a recollection of the statute of James, which has been mentioned. It certainly is not true as a general proposition; for it would contradict a series of determinations, that possession merely of a vendee may be explained.[1] Many instances will suggest themselves, where the possession of one man of the goods of another, is perfectly consistent with good

[1] See *Wheeler* v. *Train*, 3 Pick. (2nd ed.) 257, note 1.

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faith, and with the right of property in the vendor, and it was for this reason that the statute of James, in aid of the bankrupt laws, was passed. A case in 3 T. R. 322, (*Collins* v. *Forbes*,) clearly illustrates the purposes and objects, and the true construction of that statute.

If the transaction is fraudulent, the vendor setting up a condition to the sale, yet suffering the vendee to be in possession exercising full rights over the property, with the intent and purpose of enabling him to obtain credit on the strength of the property, he will not be able to avail himself of such condition, but the sale will be held to be absolute in regard to the creditors. But if *bonâ fide*, and the object of the condition was merely security to the vendor, he shall not lose his property because some creditor of the vendee supposed it belonged to *him*.[2]

It is because the judge instructed the jury, that such possession in Scholfield, permitted by the plaintiff, as would induce the creditors of Scholfield to trust him on the strength of this property, would justify a verdict for the defendant, that we think there ought to be a new trial. Possibly it may be unavailing to the plaintiff, for if there was an absolute sale and only a pretended condition, or if there was an intention and design, on the part of the plaintiff, to enable Scholfield to get credit on this property, he will have no right to recover.

New trial granted.

[2] See *Blood* v. *Palmer*, 3 Fairfield, 414; *Ayer* v. *Bartlett*, 9 Pick. 159; *Reed* v. *Upton*, 10 Pick. 522; *Whitwell* v. *Vincent*, 4 Pick. (2d ed.) 452, note 1; 2 Kent's Comm. (3d ed.) 497; *Meldrum* v. *Snow*, 9 Pick. 441; *Sawyer* v. *Shaw*, 9 Greenl. 47.

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STEPHEN BARKER 2d *versus* JONATHAN PARKER.

The holder of a promissory note, falling due on Sunday, asked the indorser, on Saturday, if it would not be best to call on the two makers, who lived about twenty miles from the holder, and who were wholly insolvent; to which he replied, that it would be of no use. On Monday it rained very hard. On Tuesday the holder made a demand on one of the makers, and took a letter from the indorser, dated on Monday, addressed to the other, stating that the indorser had been called upon to pay the note, and requesting this other maker to attend to it as soon as possible; but he had absconded, having before the note fell due made a mortgage to the indorser; which however proved to be of no value. It was *held*, that if a demand on Monday would have been seasonable, the rain furnished no excuse for not making one on that day; but it was also *held*, that the jury would be warranted in inferring that the indorser had waived a demand.

ASSUMPSIT against the defendant as indorser of a promissory note, made payable to him or his order, in one year, by Joseph Parker as principal, and John Boylin as surety, dated November 13, 1824. The declaration alleged a presentment to the makers for payment, on the 12th, 13th, and 15th of November, 1825, and due notice to the defendant. The 13th was Sunday.

At the trial before *Putnam* J. it was proved, that the makers became insolvent before the maturity of the note, and that Boylin absconded before that time. The defendant knew of the insolvency of the makers, before the note became due, and he took a mortgage from Boylin to indemnify himself against the payment of the note; but the mortgage was unproductive, in consequence of a previous mortgage and attachment. On the 12th of November (Saturday) the plaintiff asked the defendant if it would not be best to call on the makers of the note for payment; he replied, "it would be of no use." On the 14th (Monday) it rained very hard. It is about twenty miles from Methuen, where the plaintiff lived, to Carlisle, where Joseph Parker lived, by the cross roads. There is no direct communication between these towns by mail, and no post-office at Carlisle. If a letter had been put into the post-office at Methuen for Carlisle, after 12 o'clock on Saturday, it would not have gone from Methuen until 1 o'clock of the next Tuesday; if put in before 12 o'clock on
81 Saturday, it would have gone on that day to Boston, and from

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thence would have been sent to a post-office near Carlisle. On Tuesday, the 15th, the plaintiff went to Billerica, where Boylin lived, and there demanded payment of Joseph Parker about 9 or 10 o'clock in the forenoon, and ascertained that Boylin had gone to the State of New York. The plaintiff carried a letter from the defendant addressed to Boylin, dated the 14th, stating that the defendant had been called upon for the note, and that he wished Boylin would attend to it as soon as possible. The plaintiff returned and went to the defendant's house in Dracut on the 15th, and gave notice of the demand and non-payment.

The plaintiff contended that the defendant had waived any demand on the makers; and if not, that a sufficient demand and notice had been proved. By the direction of the judge the verdict was taken for the plaintiff; but if, from the evidence, the jury could not be warranted in finding that the defendant had waived a demand upon the makers, and if a demand was necessary, and there was not a demand and notice in a reasonable time, the verdict was to be set aside, and the plaintiff to be nonsuited.

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Spaulding, for the defendant, cited *Field* v. *Nickerson*, 13 Mass. R. 137; *Berkshire Bank* v. *Jones*, 6 Mass. R. 524; *Tower* v. *Durell*, 9 Mass. R. 332; (see Rand's ed. 334, note *a*; 208, note *a*;) *Garland* v. *Salem Bank*, ibid. 408.

Cummins, *contrà*, cited *Farnum* v. *Fowle*, 12 Mass. R. 89; *Eagle Bank* v. *Chapin*, 3 Pick. 180; (2d ed. 183 notes;) *Brett* v. *Levett*, 13 East, 213; *Duncan* v. *M'Cullough*, 4 Serg. & Rawle, 480; *Leffingwell* v. *White*, 1 Johns. Cas. 99; *Freeman* v. *Boynton*, 7 Mass. R. 483; *Shed* v. *Brett*, 1 Pick. 409.

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PARKER C. J. drew up the opinion of the Court. This note, having been made in 1824, was not entitled to grace,[1] the statute allowing grace on promissory notes not having passed until 1825. (See Revised Stat. *c.* 33, § 5.) It became due, therefore, on the 13th of November, 1825, and should have been demanded on the 12th, as the day of payment according to the note was Sunday.[2] As however the holder

[1] See *Jones* v. *Fales*, 4 Mass. R. 251. [2] See Bayley on Bills, (2d Am. ed.) 236.

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might wait for payment to be made through the day, and the promisor lived twenty miles distant, a demand on Monday the 14th might in this case have been seasonable. [1] The fact that Monday was a very rainy day, can form no excuse. If it had appeared that a violent tempest had so broken up or destroyed the roads, or obstructed them, that they were impassable, perhaps it might have been considered a providential interception, on account of which the plaintiff would not have been charged with negligence. No such fact appearing, there was laches which will prevent the plaintiff from recovering, unless the defendant has waived exception to it.

It appears that on Saturday the plaintiff asked the defendant, if it were not best for him to call on the makers, and he replied "that it would be of no use." Both the makers were at this time wholly without property, and one of them had absconded. The defendant had before taken all the security which he could get, though it turned out worthless. But knowing the condition of the makers, and telling the plaintiff it would be useless to call on them, was an implied assent on his part that a demand need not be made. [2] The letter written by him on the 14th to one of the makers, and sent by the plaintiff on the 15th, affords a strong implication that he had waived any advantage from any previous laches. At any rate, we think from these facts the jury might legally have inferred, that the defendant was content with the demand to be made on the 15th.

According to the agreement of the parties, therefore, the judgment is to be on the verdict for the plaintiff.

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[1] See *Haddock* v. *Murray*, 1. N. Hampsh. R. 140; *Bank of North America* v *M'Knight*, 2 Dallas, 233; *Gurly* v. *Gettysburg Bank*, 7 Serg. & Rawle, 324; *Freeman* v. *Boynton*, 7 Mass. R. 483. But see Bayley on Bills, (2d Am ed.) 231, 232, and notes; *Johnson* v. *Haight*, 13 Johns. R. 470; *Brown* v *Lash*, 4 Yerger, 210.

[2] See Bayley on Bills, (2d Am. ed.) 244, 245.

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JOHN M'KENZIE *versus* JOHN REA.

The defendant having covenanted to pay the debts of the plaintiff with the proceeds of property assigned to him for that purpose, and to pay over the balance to the plaintiff on a day specified, the plaintiff, before that day, by an instrument under seal, agreed that this balance should be put on interest by the defendant and be expended by him for the sole benefit of the plaintiff's children, the defendant "to be under bonds for the faithful performance of the trust, and to account for and refund said balance when thereto required." The defendant tendered a bond with condition to pay the debts, to apply the balance to the support and education of the children, and to pay over in equal shares to the children any balance that might remain in his hands at the decease of the plaintiff. *Held*, that the covenant to pay the balance to the plaintiff was waived, and that the bond tendered was substantially such a one as the plaintiff had required.

THE defendant executed and delivered an instrument under seal, dated December 2, 1825, in which, after reciting that the plaintiff had conveyed to him all his real and part of his personal estate, he covenants to sell the same on or before the 1st of April, 1826, and to apply the proceeds to the payment of the plaintiff's debts, and to pay over the residue, if any, to the plaintiff on or before the 1st of May, 1826. Upon this covenant the present action was brought.

On the 14th of January, 1826, the plaintiff and his wife executed and delivered an instrument under seal, in which they agree with the defendant, that the residue above mentioned shall remain in the defendant's hands, to be by him put and kept at interest, and the whole, both principal and interest, is appropriated for the sole benefit of all the children of the plaintiff and his wife, to be expended on the children in such portions, and at such times, as the defendant shall judge their necessities shall require, the defendant to be under bonds for the faithful performance of the trust committed to him, "and to account for and refund said balance when thereto required."

The defendant sold the real and personal estate conveyed to him, and paid certain debts of the plaintiff with the proceeds, and a balance remains in his hands. Before the commencement of this suit he offered to the plaintiff a bond, in which the plaintiff and his wife are named as obligees, in the penal sum of 1000 dollars. The condition, — after reciting 84

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M'Kenzie v. Rea.

that the plaintiff and his wife had conveyed to the defendant certain property to be sold, on the trust that he should pay the plaintiff's debts, and should hold the balance of the net proceeds and keep the same on interest, and should from time to time apply the balance and interest to the support and education of the children, as he should judge their necessities should require, and also reciting that the wife, for that purpose, released to the defendant all her right of dower in the real estate of the husband, and that the defendant has paid all the debts of the plaintiff and now holds the balance upon the trust above mentioned, — is, that the defendant shall perform the trust, and shall pay over in equal shares, to the children of the plaintiff and his wife, the balance, if any, that may remain in his hands at the time of the decease of the plaintiff.

The plaintiff, before commencing this suit, demanded of the defendant the balance in his hands, or that he should give a bond as mentioned in the instrument of January 14, 1826.

The parties agreed, that if the Court, upon the foregoing statement, should be of opinion that this action could be maintained, judgment should be entered for the plaintiff for such sum, &c.; but if it could not be maintained, then the plaintiff should become nonsuit.

Jan. 9th, 1828, in Suffolk.

The case was briefly argued by ***Saltonstall***, for the plaintiff, and ***Cummins*** and ***B. Merrill***, for the defendant.

The opinion of the Court was drawn up by

April term 1828.

PARKER C. J. The question in this case is, whether the bond tendered by Rea the defendant is a sufficient performance of his promise, in that regard, made by implication to the plaintiff, as set forth in the writing signed by the plaintiff and his wife, dated January 14, 1826.

If the covenant made by Rea on the receipt of the property is in force, the tender of the bond would be no performance, for he covenanted that he would pay over to M'Kenzie whatever balance should be in his hands, after paying the debts for the discharge of which the property was conveyed to Rea.

85 But on January 14, 1826, the fund being in his hands, M'Kenzie and his wife join in a declaration of trust, in which that fund is appropriated to the sole use and benefit of their

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children, and Rea is authorized to hold the same to their use, and to appropriate the same according to his discretion, to their maintenance and education, and is required to give bond for the faithful execution of his trust, and to account for and refund the balance mentioned on demand. Now if he has complied with this direction, he has substantially performed the pre-existing covenant, for he has disposed of the fund according to the wish and direction of the plaintiff. The bond offered is on condition that he will faithfully execute the trust, and that he will pay over the balance which may remain in his hands on the death of the plaintiff, to the children of the plaintiff. This is not in terms the bond which they required him to give, but if substantially the same, it is sufficient. Now by the writing, the whole fund was appropriated to the children, without any limitation, and it is stated that the wife, in furtherance of this object, had relinquished her right of dower in the real estate which was sold to pay the plaintiff's debts and create this fund. The bond tendered secures more than was required, for the defendant was to apply the fund to the use of the children at his discretion. The term *refund*, in the writing, can have no other meaning, than that he was to pay over to whosoever had the right. The condition then, to apply the proceeds to the maintenance and support of the children, and to pay over to them what shall remain after the death of the plaintiff, is a substantial compliance with his promise. We are not informed whether the action is upon the covenant, or upon the implied promise, but if either, we think it is not maintained.

LEMUEL SHAW *et al. versus* THEODORE POOR.

The registry of a deed of land executed by two, but acknowledged by one only, is presumptive, if not conclusive, evidence of notice to creditors or subsequent purchasers of the other; and whether the grantors were seised as joint tenants or tenants in common of the whole land, or respectively seised of distinct parts, is immaterial.

WRIT of entry. The parties agreed, that on the 26th of March 1793, one Samuel Downing, being seised in fee of the

Shaw v. Poor.

land which includes the demanded premises, conveyed the same to Zebediah Shattuck. Shattuck, by deed dated March 28, 1808, conveyed a part of the same, by metes and bounds, to Z. Shattuck junior, his son. On the 11th of July, 1823, Shattuck and Shattuck junior conveyed all the land described in the deed first mentioned, to the plaintiffs, by a deed of mortgage, which was sealed and delivered by both, but acknowledged by Shattuck junior only, and was recorded the 14th of the same July. The land demanded is included in that part of the Downing farm, which belonged to Shattuck senior at the date of the mortgage. This mortgage was given as collateral security for a bond executed by the two grantors in 1806, and the covenants of seisin, freedom from incumbrances, and warranty, as to the whole of the premises, are made by them jointly.

On the 1st of May, 1824, the land in controversy was attached, at the suit of Mary Barnard, as the estate of Shattuck senior, and her execution in that suit was duly levied on the same, October 21, 1824. The tenant is in possession under a quitclaim deed duly executed by M. Barnard. No other evidence appears, that at the time of the attachment she or the tenant had notice of the mortgage, than the presumption resulting from the registry of the same.

If on these facts the Court were of opinion that the demandants were entitled to recover, the tenant was to be defaulted; otherwise the demandants were to be nonsuited.

Jan. 9th, 1828, in Suffolk.

Shaw and *T. Fuller*, for the demandants, cited *Pidge* v. *Tyler*, 4 Mass. R. 547; *Taylor* v. *Jones*, 1 Salk. 389; Bul N. P. 256, cites Style 462; 1 Stark. Ev. 367.

&c.

Pickering and *Clarke*, for the tenant, cited Anc. Charters &c. 85, 303; *St.* 1783, *c.* 37, § 4; *Marshall* v. *Fisk*, 6 Mass. R. 30; *Catlin* v. *Ware*, 9 Mass. R. 220; *Dudley* v. *Sumner*, 5 Mass. R. 480; *Underwood* v. *Courtown*, 2 Sch. & Lefr. 68; *Morecock* v. *Dickens*, Ambl. 678; *Simon* v. *Brown*, 3 Yeates, 186; *Heister's Lessee* v. *Fortner*, 2 Binney, 40.

April term 1828.

WILDE J. delivered the opinion of the Court. According to the doctrine laid down by *Parsons* C. J. in the case of *Pidge* v. *Tyler et al.*, 4 Mass. R. 541, the registry of the

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deed from Shattuck and Shattuck junior to the demandants, under the circumstances of the case stated, must be considered as constructive notice of that conveyance to a subsequent purchaser. The deed, being duly executed, passed the estate to the grantees as against the grantors and their heirs. It is valid also, having been duly proved according to the statute, against an intermediate purchaser, although at the time of the registry it was not acknowledged by Shattuck senior, who was solely seised of that part of the granted premises now demanded.

The principal object of the registry act is to avoid the evils of secret grants, by providing the means of giving them publicity;[1] and when a deed is regularly recorded, all the publicity required is given, and the intention of the statute is fully satisfied. That the deed in question was regularly recorded cannot be denied; for certainly the grantees were entitled to have it recorded as the deed of the acknowledging grantor; and if so, it is impossible to say that the deed was not recorded by legal authority.[2] If then the notice required by the statute has been given, the tenant's title must fail, for a purchase, whether by deed or by levy of execution, with notice of a prior *bonâ fide* conveyance, is fraudulent and void in law. These principles are fully explained in the case referred to, and are supported by the English authorities on the construction of the statute of enrolments.[3]

It is true that this doctrine of constructive notice is denied by Lord *Redesdale* in the case of *Bushell* v. *Bushell*, 1 Scho. & Lefroy, 90, but his decision rests on the construction of the Irish registry act, which materially differs from ours, and those of England. How far Lord *Redesdale's* opinion may be supposed to have been influenced by this difference, I will not undertake to say, nor is it necessary in this case to determine; for admitting his opinion to be correct, in the full extent as reported, still we think the demandant's title must prevail. 88

[1] See 1 Story's Comm. Eq. 385, 386

[2] It is enacted by the Revised Statutes, that the acknowledgment of deeds shall be by the grantors, or one of them, or by the attorney executing the same. *C.* 59, § 12.

[3] See *Catlin* v. *Ware*, 9 Mass. R. (Rand's ed.) 220, note *a*.

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He admits that the registry is notice to a certain extent. "No person," he says, "thinks of purchasing an estate without searching the registry, and if he searches, he has notice," but he denies that it is notice to all intents, or that it is conclusive evidence of notice. Now if it is presumptive evidence only, that, in the present case, is sufficient; for it is submitted on this evidence, and it is agreed that there is no other evidence touching the question of notice, so that nothing appears to repel the presumption of notice arising from the registry, and we may decide the case for the demandants without entering on debatable ground. [1]

The case of *Heister* v. *Fortner*, 2 Binney, 40, is distinguishable from the present case, for the question there arose on a deed which had not been regularly recorded; the publicity required by statute had not been given; and no one was bound to take notice of a deed defectively proved, and not regularly registered. [2]

As to the distinction made between the registry of a deed from two or more joint tenants, or tenants in common, and that of the deed in question, there seems no authority for it. The notice is the same, whether the grantors are seised as tenants in common of the whole land conveyed, or are separately seised of distinct parts.

According to the agreement of the parties, the tenant is to be defaulted, and judgment entered for the demandants.

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[1] See 1 Story's Comm. Eq. 387 to 392.

[2] See 1 Story's Comm. Eq. 393; *Frost* v. *Beekman*, 1 Johns. Ch. R. 300 *Montgomery* v. *Dorion*, 6 N. Hampsh. R. 255; *M'Miel* v. *Magee*, 5 Mason 265; *Carter* v *Champion*, 8 Connect. R. 550.

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PHEBE ABBOT *versus* JOHN BAYLEY.

Where a feme covert, whose husband by his cruelty drove her from his house without providing any means for her support, came to this commonwealth and maintained herself here for more than twenty years as a single woman, the husband having always been a citizen of and resident in another of the United States and having since her expulsion married and cohabited with another woman, it was *held* that she was entitled to sue as a feme sole.

TROVER for a promissory note made by one Rogers to the plaintiff, dated December 3, 1823.

The defendant pleads in abatement, that the plaintiff, before and at the time of the purchase and service of the writ, was and now is under coverture of Peter Abbot, her husband, who is now living at Chester, in the State of New Hampshire.

The plaintiff replies, that at the time of her intermarriage with Peter A. on the 7th of March, 1782, he was a native citizen of New Hampshire, and at that time and long before was resident at Kingston in that State; that in 1805, he, by his cruel treatment of the plaintiff, drove her from Kingston, the place of their residence, without any means of necessary provision or support, and that he has never since that time corresponded with her nor in any manner provided her with any support, but she has lived separate and apart from him, within this commonwealth, and maintained herself by her labor as a single woman; and further, that he, from the time of their intermarriage to the present time, has continued a citizen of New Hampshire and resided therein, and after the expulsion of the plaintiff from his house, to wit, August 9, 1805, he, according to the form of law in that State, married one Susanna Mills, with whom he has ever since cohabited and now cohabits, and by whom he has had several children; she further says, that the note in question was given to her as the proceeds of her labor since her separation from her husband and that she has no other means of subsistence than her daily labor.

The defendant rejoins, that the husband, from the time of his birth, has been and now is a citizen of the United States, and now resides therein, and has not at any time renounced or abjured his allegiance and fidelity to the United States, or 90

Abbot v. Bayley.

been exiled, outlawed, or banished from the United States, or in any other way released or discharged from his allegiance thereto.

To this there was a general demurrer and joinder.

Jan. 10th, in Suffolk.

Moseley, in support of the demurrer, said that wherever the husband has permanently renounced his marital rights and is without the jurisdiction of our courts, the wife may sue as a feme sole. Reeve's Dom. Rel. 99; 1 Dane's Abr. 335. In *Gregory* v. *Paul*, 15 Mass. R. 31, the husband and wife were both aliens, and the husband had never been within the United States. That case will govern the present, unless the circumstance, that here the husband was a citizen of one of the United States, instead of being an alien, makes a difference; but it is apprehended, that on this question, New Hampshire must be regarded as a foreign state. *Shelby* v. *Guy*, 11 Wheat. 361. He referred to the cases cited in *Gregory* v *Paul*; also to *Farrer* v. *The Countess of Granard*, 1 New Rep. 80.

Gerrish, for the defendant, contended that New Hampshire was not to be considered as a foreign state, since a citizen of one of the United States is entitled to all the privileges and immunities of citizens in the several States; and that it would be against public policy to sustain this action.

The opinion of the Court was drawn up by

April term 1828.

PARKER C. J. The question is, whether the replication is an answer to the plea in abatement of coverture of the plaintiff.

If the parties to the marriage lived within this Common wealth, it is certain that the facts stated in the replication would not avoid the plea of coverture; for by the plaintiff's expulsion from the house of her husband she would have carried with her a credit against him to the extent of her necessary support, [1] and furthermore, might have obtained a divorce *a mensa et thoro*, and a reasonable alimony out of his estate. His second marriage would have been absolutely void, and she might have been divorced *a vinculo*, and been entitled to dow-

[1] See 2 Kent's Comm. (3d ed.) 149; *Montague* v. *Benedict*, 3 Barn. & Cresw. 631; *Emery* v. *Emery*, 1 Young & Jerv. 501; *Houliston* v. *Smyth*, 3 Bingh. 127; 10 Moore, 482; 2 Carr. & Payne, 22.

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er and otherwise been provided for out of his estate. But without a divorce the coverture would continue, and she could neither sue nor be sued as a feme sole.

By the statute of New Hampshire respecting marriage and divorce, passed February 17, 1791, among the causes of divorce from the bonds of matrimony, is where the husband shall willingly absent himself from the wife for the space of three years together, without making suitable provision for her support and maintenance, where it is in his power so to do. And probably where there was an expulsion of the wife from his house, and a continual refusal to admit her, this would be construed to be a voluntary desertion on his part.

Now shall the separation stated in the replication, the plaintiff having come within this Commonwealth and resided here for twenty-three years without any intercourse with her husband, gaining her own living by her labor, make her a feme sole within this State?

In the case of *Gregory* v. *Paul* the circumstances of Mrs. Gregory were very similar to those which appear in the present case. Her husband and she were British subjects, living in England, until by his neglect and ill treatment she was induced to leave him and come to this country. She was allowed to maintain an action for a legacy, and recover, notwithstanding coverture was pleaded, her husband being alive, the case being assimilated to the English cases of abjuration, exile or transportation; for though the husband remained at home, and the wife left her home, yet her abandonment of home be ing compulsory, in order to obtain a living by her industry, it was thought her case was brought within the spirit of the rule laid down in the several cases cited in the opinion of the Court.

Is there any difference between the case of *Gregory* v. *Paul* and the one before us, arising from the political relation or connexion between the several States composing the federal union? By the provision of the constitution of the United States, that the citizens of each State shall enjoy all the privileges and immunities of the citizens of every other State, are the jurisdictions and governments so amalgamated, that they are not in any respect to be considered as foreign to each

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other? In all national matters they are, in many respects, one and the same, being subject to the same laws and the same government; but in all matters of domestic regulation they may be considered as foreign; as for instance, in all their criminal jurisdiction and rules affecting property, except so far as either is subject to the laws of the United States.

Before the adoption of the national constitution, if a husband, of Massachusetts, deserted his wife and removed into another State, making no provision for her, and forbidding her to follow him, assuming a new marriage relation *de facto* in his adopted State, the wife remaining here working for her support, he exercising all the rights of a citizen of the other State and never intending to return, would not this amount to an abjuration of his native State, so that his wife might have the privileges and be liable to the burdens of a feme sole here? We think it would. Does then the union of the States, or the provisions in the constitution referred to, make a difference? The jurisdiction of the several States as such, are distinct, and in most respects foreign. The constitution of the United States makes the people of the United States subjects of one government *quoad* every thing within the national power and jurisdiction, but leaves them subjects of separate and distinct governments. The privileges and immunities secured to the people of each State in every other State, can be applied only in case of removal from one State into another. By such removal they become citizens of the adopted State without naturalization, and have a right to sue and be sued as citizens; and yet this privilege is qualified and not absolute, for they cannot enjoy the right of suffrage or of eligibility to office, without such term of residence as shall be prescribed by the constitution and laws of the State into which they shall remove. They shall have the privileges and immunities of citizens, that is, they shall not be deemed aliens, but may take and hold real estate, and may, according to the laws of such State, eventually enjoy the full rights of citizenship without the necessity of being naturalized. The constitutional provision referred to is necessarily limited and qualified, for it cannot be pretended that a citizen of Rhode Island coming into this State to live, is *ipso facto* entitled to the full privileges of a citizen.

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if any term of residence is prescribed as preliminary to the exercise of political or municipal rights. The several States then, remain sovereign to some purposes, and foreign to each other, as before the adoption of the constitution of the United States, and especially in regard to the administration of justice, and in the regulation of property and estates, the laws of marriage and divorce, and the protection of the persons of those who live under their jurisdiction. No process can go from one State into another, nor can the citizen of one State be made amenable to the laws of another, unless he come within its jurisdiction. Why then should not New Hampshire be considered a foreign state in reference to the case before us, as well as Canada or Nova Scotia? The proximity can make no difference, for the line of jurisdiction is, in a political view, an impassable barrier. If a woman of New Orleans, situated like the plaintiff, could be dealt with as a feme sole, so can the plaintiff; and if New Hampshire is in relation to this subject a foreign government, then the case of *Gregory* v. *Paul* must decide this, for in all other respects they are parallel.

This plaintiff was driven from her husband and her home more than twenty years ago. She has all that time acted as a feme sole, and been treated as such by those with whom she has had dealings. Her husband, so far from supporting her, has considered the connexion extinct, and has married and lives with another woman. It is agreed that this separation was caused by the cruelty and ill usage of the husband. He has obliged the plaintiff to live apart from him, and to get her own living by trading; and she has sustained herself as a feme sole within this Commonwealth. According to the decision in the case of *Gregory* v. *Paul*, [1] she is entitled to maintain this action.

Rejoinder adjudged bad. [2]

[1] See 15 Mass. R. (Rand's ed.) 35, note *a*.

[2] See 2 Kent's Comm. (3d ed.) 154 to 158, *Bean* v. *Morgan*, 4 M'Cord, 148.

The principle of the decision in the text has been extended by the Revised Statutes to all cases where a married woman shall come from any other State or country into this State, without her husband, he having never lived with her in this State. *C.* 77, § 18.

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WILLIAM COGSWELL *versus* THE ESSEX MILL CORPORATION.

Where the legislature authorized a corporation to build across a navigable river a mill dam of a given height, and to keep up the same head of water throughout the year, but provided no remedy for any person whose lands should be thereby injuriously flowed, it was held that the remedy must be by an action at common law, and not by a process under *St.* 1795, *c.* 74, respecting mills.

THIS was a complaint to the Court of Common Pleas, pursuant to *St.* 1795, *c.* 74, alleging that the complainant's land was flowed by reason of the respondents' mill dam, and praying that a jury may be summoned to appraise the yearly damages done to the complainant by the flowing, and how far the same may be necessary.

The respondents, in their plea, say that the complainant ought not to have a jury summoned, for that the respondents were incorporated by *St.* 1822, *c.* 25, and by the same statute were authorized to build and maintain for ever a mill dam across Chebacco river at the height of the surface of the marshes, and thereby to admit and detain the tide waters at all times of the year at that height, and that under this authority they built and have maintained a dam of that height and no higher, and thereby admitted and detained the tide waters, as they lawfully might, by which dam the flowing, if any, has been occasioned; and they say that the complainant's remedy therefor, if any, should be by an action at common law, and not by the process under the statute of 1795.

The complainant replies, that the corporation were authorized to build and maintain a dam, &c. provided they should make a waste gate twelve feet wide, and eighteen inches deep from the top of the dam, which should be kept open at all times when the high marshes should be flowed above the dam, and he avers that the corporation have never made such a waste gate.

To this the respondents demur generally.

Jan. 10*th*, 1828, *in Suffolk.*

Choate, for the respondents, after remarking that the Chebacco is a navigable river, contended that the matter disclosed in the plea was a bar to the complaint.

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1. Even if there were nothing in the charter to prevent it, this process could not be sustained. The remedy given by the 2d section of *St.* 1795, *c.* 74, has reference only to a dam authorized by the first section; which does not apply to a dam erected across a navigable river. The rights claimed by the respondents are derived wholly from their charter. *Stevens* v. *Middlesex Canal*, 12 Mass. R. 468; *Boston &c Mill Corp* v *Gardner*, 2 Pick. 37.

2. But the charter renders the statute of 1795 utterly inapplicable. The jury, under that statute, are to say how high the dam shall be, and what portion of the year the lands ought not to be flowed; but in the case at bar both the height of the dam and the time for flowing are determined by the legislature; the jury, therefore, must be sworn to perform what is beyond their power. *Spring* v. *Lowell*, 1 Mass. R. 422; *Scarro* v. *Saprany*, Cro. Jac. 119; 2 Inst. 479; *Johnson* v. *Kittredge*, 17 Mass. R. 76. The fourth section too of the statute of 1795 is inconsistent with the charter.

The replication does not avoid the plea. Suppose that the corporation cannot avail themselves of their charter because they have not complied with the condition therein mentioned, they do not therefore fall within the statute of 1795. If it was a condition precedent, the dam is a nuisance at common law; if a condition subsequent, then the dam may be maintained until by an information in the nature of a *quo warranto* the charter shall be annulled.

Saltonstall and *Shillaber*, *contrà*. The complainant has not a choice of remedies; *Stowell* v. *Flagg*, 11 Mass. R. 364, (see Rand's ed. *p.* 366, note *a*;) and it is apprehended that the proper remedy is under the statute of 1795. That statute is general in its application, making no distinction between fresh and salt, navigable and unnavigable rivers. The *Prov. St.* 13 *Ann. c.* 8. (Anc. Chart. 405,) contains provisions nearly similar. It is true that an individual cannot erect a dam across a navigable river without the consent of the legislature, but where he has done it with their consent, he is upon a footing with owners of other dams. This process is more expeditious and less expensive than a suit at common law, and was intended for the benefit of mill owners. The 96

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Cogswell v. Essex Mill Corporation.

statute of 1795 having taken away the remedy at common law, and no remedy being prescribed in the charter of this corporation, recourse must be had to that statute.

Supposing, however, that the charter, had it been pursued, would have superseded the general statute, it was incumbent on the respondents to aver that they had complied with its requisitions. But on the contrary, the demurrer admits that they have not performed an essential condition. This does not make them trespassers, but it prevents them from setting up a defence under their charter.

The supposed difficulty, that the jury cannot say how high the dam shall be nor what time the lands shall be flowed, is easily obviated. Let it be supposed that the legislature have settled the height and time, the jury, as a matter of form, may return a verdict accordingly, just as they do in any case where the parties agree upon those points.

But the charter contains provisions which are unconstitutional. The legislature virtually appropriate to one individual, for private uses, the land of another, and this too without providing any compensation. *Perry* v. *Wilson*, 7 Mass. R. 393; *Holden* v. *James*, 11 Mass. R. 396. The grant may be void so far as it affects the complainant, and valid so far as respects the consent of the legislature to build a dam across a navigable river. The presumption is, that the respondents are either owners of the soil, or have obtained the consent of the owners to build the dam, and it is not for the complainant to say they are trespassers. *Commonwealth* v. *Union Ins. Co.* 5 Mass. R. 230; *Stevens* v. *Middlesex Canal*, 12 Mass. R. 468. In this view of the case then, the respondents must be considered as coming within the statute of 1795.

Cummins, in reply, said there were substantial objections to the process of complaint. The respondents would not have accepted a charter containing the mill act, which would subject them to the fluctuating estimates of juries. They wished to have their rights secured by a permanent provision.

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April term 1828.

The opinion of the Court was drawn up by

PARKER C. J. It appears to us that the statute on which this complaint is founded does not apply to the case, as stated in the plea in bar. The statute remedy is intended only for

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cases where the owner of mill privileges, or those who have legally obtained the consent of the owner, should by means of a dam so raise and spread the water as to injure the lands of others. The case before us is where the legislature have granted the right to the corporation to obstruct a navigable river by a dam, making provision in the act itself for the security of owners of land against an injurious flowing thereof.[1] The height of the dam is determined by the statute, and therefore a jury would have no right to reduce it. The right to keep up the same head of water throughout the year is granted; a jury, therefore, could not restrain the corporation to particular seasons of the year, as it is their duty to do under the statute of 1795. [See Revised Stat. c. 116, § 18.]

Upon these two important points, there being no jurisdiction under the complaint, it would follow that the case is not at all within the statute, for in order to sustain the jurisdiction of the Court of Common Pleas by a jury, there should be power, if the case required it, to execute all the powers given by the statute. A jury once impannelled under that statute, would be obliged to assess yearly damages, to limit the height of the dam, and to fix the time when it is not necessary to flow the lands at all.[2] The jury is obliged under oath to perform these duties, and any verdict which should show that they had neglected them would be void.

Under this complaint then, if it be sustainable, the anomalous case might exist, of a jury in the country discussing the merits of a grant of the legislature, and at their discretion repealing it.

What then is the remedy if any one is injured by the execution of the act of the legislature? An action at common law. The act gives a right to erect the dam in a form supposed to be sufficient to protect from injury the property of the land owners; if it turns out insufficient, they will have an action for the consequential injury.

Replication adjudged bad.

[1] See Constit. of Massachusetts, Amendments, *art.* 5; *Comins* v. *Bradbury*, 1 Fairfield, 447; *Stowell* v. *Flagg*, 11 Mass. R. (Rand's ed.) 366, note *a*, *Case* v. *Thompson*, 6 Wendell, 637; *Baker* v. *Boston*, 12 Pick. 194; 2 Kent's Comm. (3d ed.) 337 to 340.

[2] See Revised Stat. *c.* 116, § 18.

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JOSEPH OSBORN *versus* THE INHABITANTS OF DANVERS.

Whether a person, being an inhabitant of and resident in this State, is liable to be taxed here for his personal property invested in a mercantile establishment in another State, *quære*.

Where one is overrated by assessors, whether by including in the valuation, property of which he is not the owner, or that for which he is not liable to be taxed, his only remedy is by an application for an abatement, pursuant to the statute.

ASSUMPSIT for money had and received

Upon a case stated it appeared, that the plaintiff, on the 1st of May, 1825, was an inhabitant of Danvers; that he seasonably exhibited to the assessors for the year a list of his estate; that the several items in the list amounted, according to the valuation of the assessors, to 8,350 dollars; that to this sum the assessors added 18,000 dollars, which they estimated as the value of personal property of the plaintiff not mentioned in his list, and which was then invested in a mercantile establishment for the transaction of commission business in the city of New York, in the name of the plaintiff and owned by him, but managed by his son as his agent; that upon this valuation, amounting to 26,350 dollars, they assessed him, for town and county taxes, in the sum of 81 dollars and 48 cents; that before the commencement of the action the plaintiff paid this sum, pursuant to a warrant issued to the collector of taxes for Danvers, and with a view to the institution of process to recover back 55 dollars and 80 cents, (the proportion assessed on the 18,000 dollars,) on the ground that it was assessed on property for which he was not liable to be taxed in Danvers. From depositions in the case it appeared, that for several years the plaintiff had had a large amount of property under the care of his agent at New York, which was employed in making advances upon goods consigned for sale, and that the profits of the business, accruing from interest on the advances, and from commissions, were not withdrawn, but were added to the capital.

If the Court should be of opinion that the plaintiff had maintained his action, judgment was to be rendered in his

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favor for such sum as the Court should order; if otherwise, he was to become nonsuit.

Choate contended that the plaintiff, being an inhabitant of and resident in Massachusetts, was not liable to be taxed for property which he had *bonâ fide* removed out of the State and placed under the jurisdiction of another State, with the intention that it should remain there permanently. In supporting this position he cited *Constitution*, *pt.* 2, *c.* 1, § 1, *art.* 4; Anc. Charters, &c. 69, 70, 71; *St.* 1785, *c.* 50; 1820, *c.* 64; 1821, *c.* 107; *Salem Iron Factory* v. *Danvers*, 10 Mass. R. 514; *Rising* v. *Granger*, 1 Mass. R. 47; 7 Mass. R. 526; *Putnam* v. *Johnson*, 10 Mass. R. 501; *Portland Bank* v. *Apthorp*, 12 Mass. R. 255; *Rex* v. *St. John Maddermarket*, 6 East, 182; *The King* v. *White*, 4 T. R. 771; *Earby's Case*, 2 Bulstr. 354; *Colman* v. *Anderson*, 10 Mass. R. 118; *Martin* v. *Mansfield*, 3 Mass. R. 419; *Amesbury W. & C. Manuf. Co.* v. *Amesbury*, 17 Mass. R. 463; Statute of New York, of April 23, 1823, § 10.

Saltonstall and *Proctor*, *contrà*, referred on this point to the authorities collected in 3 Pick. 136, 137, and 1 Mason, 408; 10 Mass. R. 514; 17 Mass. R. 463; *Gray* v. *Kettell*, 12 Mass. R. 161; *Little* v. *Greenleaf*, 7 Mass. R. 240. They also contended, that the tax had been paid voluntarily, and so could not be recovered back. *Bilbie* v. *Lumley*, 2 East, 469; *Knibbs* v. *Hall*, 1 Esp. R. 84; *Brown* v. *M'Kinnally*, ibid. 279; *Denby* v. *Moore*, 1 Barn. & Ald. 123; *Fullam* v. *Down*, 6 Esp. R. 26, note; *Bromley* v. *Holland*, 7 Ves. jun. 23; *Brisbane* v. *Dacres*, 5 Taunt. 144; Chit. Contr. 190. And further, that this was a case of overrating merely, and the plaintiff's only remedy was an application to the Court of Sessions, pursuant to the statute, (1785, *c.* 50, § 10,) to have the tax abated. *Stowell* v. *Flagg*, 11 Mass. R. 364; *Gedney* v. *Tewksbury*, 3 Mass. R. 309, 310; *Andover, &c. Turnp. Corp.* v. *Gould*, 6 Mass. R. 44.

Cummins, in reply, said the ground of the plaintiff's dissatisfaction was, not that he was overrated, but that he was rated at all for his property in New York; and in regard to the objection that the payment was voluntary, he said the case was

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precisely like that of *Amesbury W. & C. Manuf. Co.* v. *Amesbury*, before cited.[1]

WILDE J. delivered the opinion of the Court. Whether the plaintiff was liable to be assessed in this State, for the personal property which he had in trade in New York, is an important question, upon which we are not in this case required to express an opinion ;[1] for admitting that he was not, still we think this action cannot be sustained. The remedy, and the only remedy, for an over valuation and assessment, is under the statute of 1785, *c.* 50, § 10, by which it is provided, that whenever any person shall be aggrieved by being overrated in the assessment of any tax, he may apply to the assessors to make a reasonable abatement ;[2] and if they refuse so to do, complaint is to be made, in nature of an appeal, to the Court of General Sessions of the Peace, who are authorized to relieve him.[3] This is an adequate and convenient remedy : but great mischiefs would follow, if we were to hold that an excess of valuation would render an assessment illegal and void. And it is immaterial whether the excess is caused by including in the valuation, property of which the person taxed is not the owner, or that for which he is not liable to be taxed. In both cases the remedy is the same. As the plaintiff was liable to taxation for his personal property, the assessment was valid, although he was assessed for more than his due proportion.[4] His only remedy is by application for an abatement ; for when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued. 3 Mass. R. 309 ; 6 Mass. R. 44. Without, therefore, discussing the other points in the cause, we are of opinion that the plaintiff is not entitled to recover, and according to the agreement of the parties, a nonsuit must be entered, and judgment for the defendants for costs.

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[1] But see *Preston* v. *Boston*, 12 Pick. 13, 14, 15.

[1] See Revised Stat. *c.* 7, § 9, 10.

[2] See Revised Stat. *c.* 7, § 37.

[3] Complaints of this nature must now be made to the County Commissioners. Revised Stat. *c.* 7, § 39.

[4] See *Preston* v. *Boston*, 12 Pick. 11, 12, 13.

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NICHOLAS WOODBURY *versus* The Inhabitants of HAMILTON.

A town which acts also as a parish, may raise money to repair a meetinghouse as a compensation for the use of it for municipal purposes, or to pay a sexton for ringing the bell for town meetings, but such design should appear in the vote; for *primâ facie*, money to repair a meetinghouse, or for the pay of a sexton, is for parochial and not municipal purposes, and cannot be assessed on such inhabitants as are not members of the parish.

TROVER for certain articles of personal property distrained by the collector of taxes for the town of Hamilton, and sold for the payment of taxes assessed upon the plaintiff for the year 1826.

Upon a case stated it appeared, that the inhabitants of that part of the town of Ipswich called Ipswich Hamlet, were incorporated as a parish about the year 1714. In 1762 they built a meetinghouse, which was used for parish purposes only, until June 21, 1793, when the lands and inhabitants of the parish, with certain other lands and inhabitants, were incorporated into a town by the name of Hamilton. Ever since that time the meetinghouse has been used on Sundays, and at other times, by the parish or congregational society in Hamilton, and the meetings of the inhabitants of the town for municipal purposes have been held therein during the same period. The town is a territorial parish. There are no separate parish officers, but the assessments for the support of the minister are made by the town assessors. The parish concerns have at all times, since the town was incorporated, been transacted in town meetings.

At a meeting of the inhabitants, March 12, 1826, it was voted to raise 1000 dollars to defray the expenses of the town for that year, and 300 dollars for the schools; and at an adjournment of the same meeting it was voted to raise 100 dollars in addition, for repairing the meetinghouse.

This sum of 100 dollars was applied by the selectmen conformably to the vote. The sum of 12 dollars was paid to the sexton for the year 1826, pursuant to a contract with the selectmen, according to the usage of the town. The sexton

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takes care of the meetinghouse, and rings the bell for public worship and for town meetings.

In the tax assessed against the plaintiff for the year 1826, was included his proportional part of the two sums last mentioned. The plaintiff, at the time of the assessment of the tax, was not, nor for seven years preceding had been, a member of the congregational society in Hamilton.

Huntington, for the plaintiff.

Saltonstall, for the defendants.

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PARKER C. J. It does not seem necessary to determine in order to settle this case, whether the parish of Ipswich Hamlet continues in existence notwithstanding the incorporation of the inhabitants of the same territory, with others, into a town. If the parish exists it does not seem to have acted independently of the town; on the contrary, all the parochial affairs have been conducted under the form of town meetings. The question essentially is, whether the money for which the tax was assessed was raised for town purposes, or for purposes connected with the support of public worship. If the former, the tax is legally assessed; if the latter, as the plaintiff had ceased to be a member of the parish, or of the town for parochial purposes, he was not liable to be assessed. *Primâ facie*, money raised to repair a meetinghouse or for the pay of a sexton, is for parochial and not for municipal purposes, for the former is not town property in a municipal sense, and the latter is not a town officer. Without doubt a town which uses a meetinghouse for its public purposes, other than religious worship, may agree to pay for this use, and if they employ a sexton to ring the bell on secular occasions, they may undertake to pay him, and money voted for these purposes may legally be assessed; for as they may lawfully build a house for such purposes, so they may hire one; and they may as well pay a sexton for ringing the bell for them, as any other person. But in order to justify a tax for such purposes on such inhabitants as are disconnected from them in parochial affairs, the record of the vote should show that such were the purpose and object of raising the money. We presume the vote on which this tax was assessed, does not express that it was to

103 compensate for the use of the meetinghouse and the employ-

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ment of the sexton for municipal purposes; and if it be so, we think it clear that the tax was illegal, so far as it relates to the plaintiff, as much as would be a tax for the minister's salary. If, however, the purpose of raising this money was to pay for the use of the meetinghouse and the service of the sexton for municipal purposes, and such appears on the records, of which we have no copy, the plaintiff has been legally assessed and his property rightfully distrained.

This case must stand or fall by that distinction. If a bet ter case cannot be made for the defendants, they must be defaulted; if it can, they must have a new trial, or agree on a new state of facts.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1828, AT BOSTON.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

ELIZABETH HILL, Administratrix, *versus* MARGARET T. WELLS.

A complaint under *St.* 1785, *c.* 66, § 2, for the maintenance of a bastard child, partakes of the nature both of a criminal and a civil suit, and in the city of Boston it is cognizable by the Police Court and the Municipal Court.

Where upon a petition for *certiorari*, it appeared that the proceedings upon such complaint were before and by the authority of the "Justices' Court for the county of Suffolk and of the Police Court for the city of Boston," it was *held*, that as the same persons were the justices of both of these courts, they must be presumed to have acted as justices of the Police Court, and the description of the other court might be rejected as surplusage.

The minute interest which the justices of the Municipal and Police Courts in Boston have, as inhabitants, in such a prosecution, does not disqualify them for taking cognizance thereof, there being no other court within the city, which has jurisdiction in such cases.

The statute does not require that the complainant in such a prosecution shall be an inhabitant or have a legal settlement in any town in the county in which the prosecution is instituted.

Jan. 1826. MORTON J. delivered the opinion of the Court. This is a petition for a writ of *certiorari* to remove the proceedings of

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the Municipal Court for the city of Boston upon the complaint of the respondent, charging the petitioner's intestate with being the father of a bastard child born of her body. The respondent having been notified, has appeared before us, and the parties have been heard upon the merits of the case; and whether the petition shall be granted or refused, depends upon our opinion of the legality of the proceedings before the Municipal Court.

The first and principal objection is to the jurisdiction of that Court.

By the second section of the "act for the punishment of fornication, and for the maintenance of bastard children" (*St.* 1785, *c.* 66), jurisdiction of all cases arising under that act was expressly given to the Court of General Sessions of the Peace. This jurisdiction remained unchanged in that court till the year 1800; when by *St.* 1799, *c.* 81, the Municipal Court for the town of Boston was created. This statute gave to the Municipal Court "cognizance of all crimes and offences committed within the town of Boston,"[1] which were before "cognizable in the Court of General Sessions of the Peace." Did these words transfer to the Municipal Court cases arising under the bastardy act? If they did not, the jurisdiction remained in the General Sessions till 1804, when it was transferred to the Common Pleas, where it still remains. *St.* 1803, *c.* 154. Will the words "all crimes and offences" include prosecutions for bastardy? Is this a criminal or a civil suit?

The proceedings under the several bastardy acts of England are considered criminal prosecutions and are regulated by the rules which govern criminal processes. Persons exempted from imprisonment on civil processes are liable to commitment for disobedience of orders of the Sessions for the maintenance of bastard children. *Rex* v. *Archer*, 2 T. R. 270; *Rex* v. *Bowen*, 5 T. R. 156.

Although the provisions of the English statutes are essentially like ours, yet in some particulars, and especially in the forms of proceeding under them, they so far differ, as the

[1] See Revised Stat. *c.* 86, § 4.

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no very strong argument can be drawn from their genera. analogy. By the English statutes the prosecutions are commenced by the overseers of the poor, and the mother may be compelled to testify. She also is liable to commitment for refusing to contribute towards the support of the bastard child. On the contrary, by our statute the mother is necessarily a party to the suit, and is not subject to any order of the court in relation to the maintenance of the child.

A process under the statute of bastardy of Connecticut, which resembles ours, has been held to be a civil suit. *Hinman* v. *Taylor*, 2 Connect. R. 357. In Maine, a process under their statute, which is a copy of ours, has been considered a civil suit so far as that the prevailing party is entitled to recover his costs. *Mariner* v. *Dyer*, 2 Greenl. 172. And the same point is said to have been settled under our own statute. *Wormstead's Case*, 1802, 2 Dane's Abr. 517.

That incontinence is a crime, cannot be questioned. And although in England it is cognizable only by the spiritual courts (4 Bl. Comm. 65), yet in this State it is punishable by virtue of the first section of the statute of 1785, *c.* 66. And in England the fathers and mothers of bastard children are punishable by statute.

A prosecution by the mother against the putative father of a bastard child under our statute, seems to be *sui generis*, and probably is not strictly either a civil or criminal suit, but its object and form partake of the nature of both.

Many of the rules governing civil actions are applicable to it. It is commenced by and in the name of an individual, and not in the name of the Commonwealth. The complainant may, in any stage of the proceedings, discontinue the suit, or release the cause of action. She also may amend her complaint as in civil suits. Although the complainant is a competent witness, yet she cannot be compelled to make complaint or to testify in the case. Depositions are admissible on the trial. The defendant is not arraigned, but appears and pleads by attorney; and if he prevails, is entitled to recover costs as the prevailing party.

The object of the suit is the redress of a civil injury. It is to compel the putative father to aid the mother in the sup-

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port and maintenance of the child. This end is secured by a bond from the father, for the failure to give which he is liable to punishment. Although one object of the statute seems to be, to provide security to the town liable to support the bastard, yet it has omitted to provide any remedy for the town, unless the mother chooses to prosecute.

This process has also many of the properties and characteristics of a criminal suit. It is founded upon a complaint made under oath. It is commenced by a criminal capias or warrant. It is returnable immediately upon the arrest of the defendant. He is not entitled to any previous stated notice, as in civil actions. It is returnable to a court of inquiry. The officer making the arrest cannot take bail. The defendant is bound to answer *instanter*, upon being brought before the magistrate, and if there is probable cause for the prosecution, he is bound over for trial, and upon his failure to give bond is committed.[1] The final order of the court, that the defendant aid the mother in the maintenance of the child, and give security to perform the order, and also to save the town harmless, is more like a sentence than a civil judgment; as the defendant, on failure to comply with the order, is immediately committed, and not entitled to a discharge by taking the poor debtor's oath.[2]

This process being neither wholly civil nor wholly criminal, but having many of the features and incidents of each, we are left to determine from the manner in which the legislature has treated it, whether they intended to include it in the one or the other class of suits. And they might well, in some respects, treat it as a civil, and in others, as a criminal suit.[3]

We have already seen, that the statutes in force in England, at the several periods of the legislation upon the subject of bastardy by the colonial and provincial legislatures, treated it as "a criminal matter." In all our ancient statutes it is classed with "crimes and offences." In 1692 the provincial

[1] See Revised Stat. *c.* 49, § 1.

[2] But see *St* 1825, *c.* 173; Revised Stat. *c.* 49, § 5.

[3] In *Wilbur* v. *Crane*, 13 Pick. 289, it is said that a complaint by a woman under the bastardy act, accusing a man of being the father of her bastard child, though in some respects in form of a criminal prosecution, is in substance and effect a civil suit.

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legislature, in revising the colonial laws, include provisions in relation to bastardy, in "an act for the punishing of criminal offenders," with those against profane swearing, drunkenness, larceny, burglary, robbery, libels, forgery, and perjury. *Prov. St.* 4 *W. & M. c.* 6, (Anc. Chart. &c. 239). It will also be seen, by a reference to these statutes and to the revised statute now in force, that cognizance of this subject has, for nearly two centuries, been vested in a court of criminal jurisdiction. We are therefore fully satisfied, that in the transference of the powers of the Court of Sessions to the Municipal Court by the statute of 1799 above cited, the legislature intended to include all cases arising under the statute of bastardy.

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One other consideration fully confirms us in this construction. By *St.* 1800, *c.* 44, the Court of Sessions for the county of Suffolk was deprived of a jury. If therefore the jurisdiction was not transferred in 1800 to the Municipal Court, but remained in the Sessions, the latter court was unable to execute the laws of bastardy, because, by the act, prosecutions under it were to be tried by jury; and the legislature had deprived the court in which alone they had vested the jurisdiction, of the means of trying the complaints in the only way in which by law they could be tried.

We are for these reasons of opinion, that the objection to the jurisdiction of the Municipal Court is not well founded.

But it is further contended, that if the Municipal Court has jurisdiction of prosecutions of this kind, yet that the preliminary proceedings were irregular and void, and so the case never was rightfully before the court.

It appears that the examination and accusation were made before "the justices of the Justices' Court for the county of Suffolk and of the Police Court for the city of Boston," and that the warrant upon such accusation, for the apprehension of the putative father, was granted by the same authority. It is now said, that although there is a "Justices' Court" and a "Police Court" established by law, yet that there is no such tribunal as is described in the combined title of both. But we learn from the statute, that the same persons are justices of both these courts, and we are of opinion, that if either of the

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courts had authority to take the examination and grant the warrant, the justices must be presumed to have acted in the capacity in which they were authorized to act, and the description of the other court may well be rejected as surplusage

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The Police Court, by *St.* 1821, *c* 109, [see Revised Stat. *c.* 87, § 3,] has cognizance of all crimes, offences and misdemeanors committed within the city of Boston, whereof justices of the peace had cognizance before the passing of that act. The same reasoning which satisfied our minds that the Municipal Court has jurisdiction of the case, shows that the Police Court was authorized to institute the preliminary proceedings. 109

The objection that the justices of these two courts are interested, and therefore not authorized to adjudicate cases of bastardy, cannot be supported. It is true, that being inhabitants of Boston, they have a very minute interest, and that where a prosecutor has an option in the tribunals before which he will prosecute, he may not select an interested tribunal. Where a penalty recoverable before a justice of the peace enures to a town, it shall not be recovered before a magistrate who is an inhabitant of the town entitled to the penatly. *Pearce* v. *Atwood*, 13 Mass. R. 324. In all cases where the penalty enures to the Commonwealth, or where a crime is punishable by fine, every citizen of the Commonwealth has an interest in the conviction, and the tribunal must necessarily have the same kind of interest which the justices of the Municipal and Police Court have in the present case. But from the necessity of the case, such crimes and forfeitures must be tried by citizens of the Commonwealth.

The legislature have given jurisdictions to these courts, notwithstanding the interest which the justices may be supposed to have, and that this was a constitutional and proper act, is too plain to be doubted. *Commonwealth* v. *Ryan*, 5 Mass. R. 90.[1]

The objection that the mother of the bastard child was not an inhabitant of the city, does not appear from the papers to

[1] See *Davis* v. *Salisbury*, 1 Day, 278.

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be founded in fact. But if it should be shown, it could not avail the petitioner. The principal object of the suit, which can be maintained only by the mother, is to compel the putative father to aid the mother in the support of the child. The statute provides that *any single woman* may make complaint, and does not require that she should be an inhabitant or have
110 a legal settlement in any town in the county in which she may commence her suit, or even in the Commonwealth.

The petitioner, having failed to show any irregularity in the proceeding which will authorize us to reverse the judgment upon certiorari, can take nothing by her petition.

Rand, for the petitioner.

Fletcher, for the respondent.

Henry Sawtell, Petitioner, &c.

The justices of the Justices' Court for the county of Suffolk have authority to establish certain days in the week as regular term days of that court, and to continue actions from term day to term day.

Where the defendant in an action in that court was defaulted in consequence of the clerk's forgetting to enter his appearance on the docket, but no judgment was entered up, it was held that the justices had power, at their discretion, at a subsequent term day, to take off the default, and to order the cause to stand for trial.

Upon the petition of Henry Sawtell, a rule was granted, commanding the justices of the Justices' Court for the county of Suffolk, to show cause why they had refused to enter up judgment and issue execution thereon, on a writ of Sawtell against one Noyes, which had been entered in the Justices' Court, and whereon Noyes had been defaulted.

The justices made return, that on the organization of that court under *St.* 1821, *c.* 109, they established Wednesday and Saturday in every week as term days for holding the court, and the first Wednesday in every month as a law day; and that they also established, as a rule of the court, "that in all actions, when there is an appearance for both parties, the cause shall be continued to the succeeding regular day of the sitting of the court, on motion of either party, and no costs

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shall be taxed for the travel or attendance of any witnesses c ı the return day of any writ, unless a trial shall be then had by consent," &c. At a term day on Wednesday, the 5th of December, 1827, an action of Sawtell against Noyes was entere l on the docket of the court, and when the docket, on that day, was called over, no appearance for Noyes being entered thereon, he was defaulted. On Saturday, the 8th of December, no judgment having been entered up, *S. D. Parker*, as attorney of Noyes, moved that the default might be taken off, and that the action might be tried. *F. Gardner*, as attorney of Sawtell, objected, and requested that judgment might be entered up. The parties, by their attorneys, were then heard on the motion, and it was proved to the satisfaction of the court, that the attorney for the defendant had, four days before the return day of the writ, duly filed in the clerk's office his account in set-off, and notified the clerk that he should appear for the defendant and have a trial of the action, and requested the clerk to enter his name and appearance on the docket, to which the clerk assented ; but as the actions for that term day were not then entered on the docket, the clerk, on that day, when they were entered, forgetting these facts, neglected to enter any appearance for the defendant, and when the action was called, a default was entered on the docket. The court were also well satisfied, that the parties expected a trial, and that the due administration of justice required that there should be one. Whereupon the justice who sat on the 8th of December, considering that the Justices' Court is a court of record, and that in all cases where judgment has not been entered up, it has power to cause the record to be amended, according to the justice of the case, and the truth of the fact, directed that the action should stand continued until Wednesday the 2d of January, 1828, so that all the justices might advise thereon, and finally decide on the motion. On that day the justices, after hearing counsel and advising on the motion, ordered that the default should be taken off and that the action should stand continued for trial until the next term day of the court.

Sawtell Petitioner &c.

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The case was now briefly argued by *F. Gardner*, for the

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Sawtell, Petitioner, &c.

petitioner, and *S. D. Parker*, on the other side; and the opinion of the Court was afterwards drawn up by

PARKER C. J. The statute of 1821, c. 109, by which the Police Court is established within the city of Boston, provides, in the sixth section, that a court shall be held by one
112 or more of the justices of the Police Court, on two several days in each week, and as much oftener as may be necessary, to be called and styled the Justices' Court for the county of Suffolk; and that all the said justices, shall, from time to time, assemble, to establish all necessary rules for the orderly and uniform conducting of the business of said court, so as to insure a constant, prompt, and punctual performance thereof. The particular days of the week not having been designated by the act, on which these courts should be held, it necessarily became the duty of the justices to appoint the days, and it was properly considered by them as within the authority conferred by the 6th section, to designate two certain days for that purpose, and when designated, these days became the stated terms of the court, as much as if they had been so enacted expressly by the statute.

It appears by the return of the justices of the court, that Wednesday and Saturday of every week have been assigned by them as the regular term days, and they have provided for continuances from one day or term to the other, as we think they might lawfully do within the spirit of the authority given to them to make rules for the purposes aforesaid. The action then which is the subject of this application, being entered on their clerk's docket on a Wednesday, might lawfully have been continued to the next term day, and so from term to term as the judge holding the court should think justice required. There having been no appearance entered on the docket, but a default of the defendant, regularly judgment should have been entered, in which case the issuing of an execution would have been a duty of the clerk. But no judgment was entered or prayed for on the term day when the default was entered. Nor does it appear that there was any general order for judgments in case of defaults. The clerk then was not obliged to issue execution, and in the circumstances of this case, as stated in the return, we think he did right in refusing it.

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The case then stood on the docket as an unfinished one, in which there had been a default, but no judgment, until the next term day, when there was a motion by the plaintiff for judgment. We think the court had a right to deny this motion, if it appeared there had been any omission of the clerk, or any mistake of the party, by which the default was occasioned; and that it was competent to the court then to take off the default and order the cause for trial. This proceeding is much more advantageous to the plaintiff himself, than to have ordered judgment and obliged the defendant to apply to the Court of Common Pleas for a review. We are of opinion, that there having been no judgment, it was within the discretionary power of the court to take off the default, as much as it would have been to order judgment. The case remaining on the docket unfinished, they had jurisdiction over it to sustain either motion

Mandamus refused.[1]

COMMONWEALTH *versus* SELDEN BRAYNARD.

Where one, being under a recognizance to keep the peace, committed a breach of the peace, for which he was indicted and fined, it was *held* that he was nevertheless liable to an action for the penalty of the recognizance.

UPON a case stated it appeared, that the defendant was indicted and convicted of an assault and battery on one Rice, and sentenced to pay a fine and costs, and to give security by recognizance to keep the peace, as to all citizens, and especially Rice, for one year; and that he complied with the sentence. Within the year he committed another assault and battery upon Rice, for which he was again indicted and convicted, and sentenced to pay a fine and costs, and he complied with this sentence. The present action was brought to recover the amount of the recognizance above mentioned. If these facts constituted a bar to the commonwealth's recovering the penalty

[1] See Revised Stat. *c.* 87, § 43.

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of the recognizance, the defendant was to be discharged; but otherwise he was to be defaulted.

S. D. Parker, for the defendant, suggested that the government might either indict for the second assault and battery, or bring an action upon the recognizance, but not both, as this would be punishing twice for the same offence. But the *Court* were clear that the action was sustainable, and declined hearing *Austin*, who appeared on behalf of the commonwealth.

Defendant defaulted.[1]

PAUL GARDNER *et al. versus* AARON MITCHELL.

A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative in relation to facts testified at the trial.

In an action for a breach of warranty on the sale of oil warranted to be of a fair merchantable quality, each party introduced the testimony of witnesses who had examined the oil, and a verdict was found for the plaintiff. On a motion for a new trial on the ground of evidence newly discovered, of the plaintiff's admission that the oil was of the proper quality, this was held to be a new fact and not cumulative, and the evidence at the trial being nearly balanced, a new trial was granted.

AT the term of this Court held at Nantucket in July 1827, the plaintiffs recovered a verdict for 5,337 dollars, in an action brought for an alleged breach of contract on the sale of two parcels of oil, one of 1000 barrels, the other of 50,000 gallons, which oil was warranted by the defendant to contain twenty-eight parts in a hundred of head matter, and to be of a fair merchantable quality. The plaintiffs introduced evidence tending to show that the oil delivered was deficient in quantity and quality, and that it did not contain the stipulated proportion of head matter. The defendant now moved for a new trial, on the ground of newly discovered evidence.

This evidence appeared in the depositions of S. Ewer and M. Myrick.

Ewer testified, that in March 1827 the plaintiffs called him

[1] A recognizance of bail is not designed as a satisfaction of the offence, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence. *Ex parte Milburn*, 9 Peters, 710.

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into their candle house and showed him some oil, and said they had received that in lieu of good head matter, from the defendant; that they complained of its being bad, and also of the gauge's not holding out; that the deponent asked Gardner if he had received a proportion of head matter, and he answered that he had, if it had been good head matter; that the deponent asked him if he was satisfied with the body oil, and he answered that he had heard no complaint about it, that he thought it of a fair quality for Japan oil.

Myrick testified, that in February 1827, he observed to Gardner, "All the demand you have against Mitchell, is short gauge, for six or seven hundred gallons;" and that Gardner replied, "That is true, but we think it is our right, and we ought to have it made up."

Other facts are stated in the opinion of the Court.

Sullivan and *L. Williams*, in support of the motion, cited *Halsey* v. *Watson*, 1 Caines's R. 24; *Steinbach* v. *Col. Ins. Co.* 2 Caines's R. 133; *Doe* v. *Roe*, 1 Johns. Cas. 402. March 20th

K. Whitman, *contrà*, cited *Steinbach* v. *Col. Ins. Co. ubi supra*; *Pike* v. *Evans*, 15 Johns. R. 210; *Smith* v. *Brush*, 8 Johns. R. 65; *Williams* v. *Baldwin*, 18 Johns. R. 489.

Per Curiam. The bar are aware that the Court look with jealousy upon applications like this,[1] as it has become so common to apply for a new trial because the verdict was against evidence, or on account of evidence discovered since the trial, and it is so easy to procure new evidence to suit the case. And yet it is absolutely necessary that the Court should have a control over verdicts, for sometimes they seem to be given unaccountably against the manifest justice of the case. March 25th

This action is brought upon a contract of sale of a quantity of oil, with a warranty that it should be of a merchantable quality, and should contain a certain proportion of head matter. It is alleged that the contract was not performed in regard either to the quantity or the quality of the oil delivered. The Court have been obliged to look into the whole evidence, in order to see the applicability of that which has

[1] See *Coe* v. *Givan*, 1 Blackford, 367; *Bond* v. *Cutler*, 7 Mass. R. 205.

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been newly discovered. The plaintiffs introduced evidence which seemed very strong, and if it had been believed, the damages should have been twenty or thirty thousand dollars, instead of five thousand. On the other hand, it appeared that after the oil had been partly manufactured, so that the plaintiffs could have ascertained its quality, they entered into a reference solely in regard to the quantity delivered, nothing being said of the quality. Two persons, one appointed by the plaintiffs and the other by the defendant, were employed to gauge the oil, and in gauging it is quite easy to ascertain the quality. There was evidence likewise, that if the oil had been as bad as it was represented by the plaintiffs, it would have been impossible to manufacture it into candles; nevertheless it was all sold before the trial, and the purchasers have made no application to the plaintiffs on account of its bad quality. We should have considered it at least a balanced case, notwithstanding the strong evidence on the part of the plaintiffs. Then comes the recently discovered evidence, upon which the application for a new trial is grounded. This is somewhat of a critical matter, as a party may so readily obtain new evidence to supply former deficiencies. Still the Court ought not to shut their eyes to injustice on account of facility of abuse in cases of this sort. The evidence now brought forward is of confessions of the plaintiffs, and the question is whether it is new, or only cumulative. If only cumulative, it does not furnish a sufficient cause for a new trial.[1] This is the ground taken in New York, and the reason is, that the party should have taken care to produce evidence enough to establish his point. But this evidence is of a different character. As to the body oil, which is made a subject of complaint, there is a confession of one of the plaintiffs that it was as good as he expected. This is a

[1] See *Alsop* v. *Commercial Ins. Co.* 1 Sumner, 476, 477; *Ames* v. *Howard*, 1 Sumner, 490, 491; *People* v. *Superior Ct. of New York*, 10 Wendell, 285; *Wheelwright* v. *Beers*, 2 Hall, (New York,) 391; *People* v. *Superior Ct. of New York*, 5 Wendell, 114; *Gygott* v. *Butts*, 4 Wendell, 579; *Whitbeck* v. *Whitbeck*, 9 Cowen, 266; *Chatfield* v. *Lathrop*, *post*, 417; *Baker* v. *Briggs*, 8 Pick. 122; *Warren* v. *Hope*, 6 Greenl. 479; *Bullock* v. *Beach*, 3 Vermont R. 73, *Reed* v *M^c Grew*, 5 Ohio R. 386.

Cumulative evidence is such as tends to support the same fact which was before attempted to be proved. *Chatfield* v. *Lathrop*, *ubi Supra*. See *People* . *Superior Ct. of New York*, 10 Wendell, 285.

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new fact which was not before in the case. The verdict was general, and apparently injustice has been done; and this being upon the trial a nicely balanced case, we think it should go again before the jury, with this new evidence.

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New trial granted.[a]

S. MITCHELL *et al. versus* THE NEW ENGLAND MARINE INSURANCE COMPANY. 117

A plaintiff cannot be nonsuited against his consent, if he insists on his right to appear when called. *Semble.*

Where a ship insured was surveyed during the voyage and condemned as not worth repairing, and in an action upon the policy, the underwriters defended on the ground of unseaworthiness, it was *held* that the production of the survey was not essential to the support of the action.

THIS was *assumpsit* upon a policy of insurance, dated August 13, 1823, upon the ship Brothers and the outfits, at and from Nantucket to the Brazil Banks, &c. on a whaling voyage. The vessel was lost on the 31st of August, 1824, at Rio Janeiro.

The cause was tried before *Putnam* J., at Nantucket. The defence was, that the ship was unseaworthy. One Clark

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[a] An application of the like nature was made in the case of *The Inhabitants of Yarmouth* v. *The Inhabitants of Dennis*, tried at May term 1827, in Barnstable. The question at the trial was, whether Phebe Crowell, a pauper, lived in Dennis on the 19th of June, 1793, the time when that town, previously a part of Yarmouth, was incorporated, and so had her settlement in Dennis. Witnesses on each side concurred in saying that she lived in the house of one Studley in Yarmouth, and that while she lived there the house was struck by lightning; but they differed as to the time when this accident happened, those on the part of the defendants testifying that it was before June 19, 1793. A verdict was found for the defendants. The evidence newly discovered by the plaintiffs was the testimony of four witnesses, by whom they expected to prove, that the accident by lightning took place three years after the time stated by the witnesses on the other side. But the *Court* considered this evidence as merely cumulative, and refused a new trial.

J. Reed and *T. Parsons*, for the plaintiffs.

Marston, for the defendants. *Reporter.*

[a] See *Warren* v. *Hope*, 6 Greenl. 479. In a motion for a new trial on account of newly discovered evidence, the evidence must be disclosed, and the motion granted or refused, according as the court may judge such evidence to affect the justice of the case. *Ludlow* v. *Park*, 4 Ohio R. 44.

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testified, that he, with three others, was called to survey the ship at Rio Janeiro; that they reported that she should be condemned; and that they gave the survey to the American chargé d'affaires, at that place. The witness stated in detail the condition of the vessel. The testimony of Clark was contradicted by witnesses on the part of the plaintiffs. The log-book was proved and given in evidence. The plaintiffs offered the protest; to which the defendants objected. The defendants called for the survey, but the plaintiffs did not
118 produce it, nor give any excuse for not producing it, and for that reason the defendants' counsel moved that the plaintiffs should be nonsuited. The motion however was overruled, and a verdict was returned in favor of the plaintiffs. If they ought to have been nonsuited, the verdict was to be set aside and a new trial granted.

March 24th. *L. Williams* now insisted that the plaintiffs ought to have been nonsuited for not producing the survey, and cited *Garrigues* v. *Coxe*, 1 Binney, 597; *Armroyd* v. *Union Ins. Co.* 2 Binney, 394; *Mar. Ins. Co. of Alexandria* v. *Wilson*, 3 Cranch, 192; *Haff* v. *Mar. Ins. Co.* 4 Johns. R. 132.

T. G. Coffin, for the plaintiffs. If the survey was a paper which we were bound to produce, the non-production of it would let the other party into secondary evidence, but was not a ground of nonsuit. The protest and survey are comparatively of little consequence, and may be controlled by other evidence. The log-book is the important document, and that was produced. Stevens on Av. 152.

Hubbard, in reply. In *Gordon* v. *Mass. F. & M. Ins. Co.* 2 Pick. 264, the Court say that the survey, though not conclusive, is very strong evidence of the condition of the vessel; it is therefore a material document. It is the duty of the master to call upon skilful persons, to make the survey, and the owner is always bound to produce their report, to justify the conduct of the master. It is *primâ facie* evidence of the facts which it states. [*Parker* C. J. Does it make any difference, that you had from Clark what was stated in the survey?] It does not appear that he testified all that the survey contained. He was but one witness, and the jury might have

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disbelieved him, when they would have given credit to the survey

The Court have power to order a nonsuit for the insufficiency of the plaintiffs' evidence. Anc. Charters, &c. 46 ; *Rose* v. *Learned*, 14 Mass. R. 154. [*Pratt* v. *Hull*, 13 Johns. R. 335.]

Per Curiam. We are not clear that the judge had a right to order a nonsuit in the present case. When a nonsuit is directed, the party is called, and if he appears when called, how can he be nonsuited ? There is in such case no contempt of Court. We are not certain that the same difficulty does not occur in England. In *Watkins* v. *Towers*, 2 T. R. 281, where it was alleged that there was a deficiency of evidence on the part of the plaintiff, and a motion was made to nonsuit him, *Grose* J. said, "I should think that we could not order a nonsuit to be entered against the consent of the plaintiff." In *Aylett* v. *Lowe*, 2 W. Bl. 1221, it was decided by all the court, that it was impossible to order a nonsuit to be entered, unless by consent, after the plaintiff had appeared and a verdict had been taken. We should think that nonsuits have been entered rather by consent, upon the recommendation of the judge, either with a view to raise a question of law, or because the counsel were satisfied that the action could not be sustained.[1] If the defendants considered the production of the survey indispensable to a recovery by the plaintiffs, they should have requested the judge to instruct the jury to that effect, and then the question might have been properly brought before the whole Court. A motion to nonsuit was not correct in point of form. But if there was substantial ground for such application, the defendants should have a remedy. That the survey is a very important paper, though not conclusive evidence, cannot be doubted ; 2 Pick. 263 ; and it is to be considered, what shall be the effect of its non-pro-

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[1] See 1 Stark. Ev. (5th Am. ed.) 471 to 473; *Ward* v. *Mason*, 9 Price, 291; *Elworthy* v. *Bird*, 13 Price, 222. But see *Perley* v. *Little*, 3 Greenl. 97; *Sanford* v. *Emery*, 2 Greenl. 5. If the plaintiff proves all that is laid in his declaration he ought not to be nonsuited. The only ground of nonsuit at the trial is, that the proof is not sufficient to support the declaration *Safford* v. *Stevens*, 2 Wendell, 158.

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duction. In *Haff* v. *Marine Ins. Co.* 4 Johns. R. 132, the survey had not been shown to the underwriters before the action was commenced, and the question was, whether there had not been a deficiency of preliminary proof of the loss, and not whether the non-production of the paper at the trial was fatal; but the case was determined upon a special clause in the particular contract. This seems to be, in effect, an application for setting aside the verdict for the want of evidence necessary to sustain the action. On the part of the defendants was the testimony of one of the surveyors, tending to show that the ship went to destruction from natural decay; and there was evidence to the contrary on the other side. On which side the evidence preponderated, it is not material to inquire, since this is not an application to set aside the verdict as being against the weight of the evidence. But the question is,
120 whether the production of the survey was indispensable; and we think it was not.[1] The defendants had seen that document, and they had the benefit of it, and perhaps to a greater degree than if the paper itself had been produced. We therefore cannot grant a new trial.

Judgment according to verdict.

ISRAEL THORNDIKE *versus* GEORGE DE WOLF and Trustees.

Where one summoned in a process of foreign attachment, disclosed that he had in his hands property, the title to which was in controversy between the principal defendant and a third person, being submitted to referees, and that during the pendency of the process, the referees had awarded in favor of the principal defendant, he was adjudged trustee.

Where property was given to two as owners of a ship, it was *held* that it belonged to them as tenants in common, and not as partners, and that a prior attachment of it by a creditor of one of them, was valid against a subsequent attachment by a joint creditor.

THIS case was argued at the last March term, by *Bartlett*, for the trustees, and *F. Dexter*, for the plaintiff; and at this term the opinion of the Court was delivered by

[1] See 2 Phillips on Ins. 439; *Robinson* v. *Clifford*, 2 Wash C. C. R. 1

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PARKER C. J. Sargent and Brooks, who were summoned as trustees in this case, have disclosed, that before the service of the writ upon them, one Lewis consigned to them, as commission merchants, an invoice of silk goods, which they sold, and the proceeds of which they have in their hands; that De Wolf and one Smith claimed the proceeds as belonging to them, in virtue of their alleged property in the silks; that a written order, signed by De Wolf, Smith and Lewis, was left with them, authorizing them to retain the proceeds until the right to the property should be settled by certain referees, to whom they, that is, Lewis, De Wolf and Smith, had submitted the controversy; that after the service of this writ upon them, the referees decided that De Wolf and Smith were entitled to a portion of the property as owners of the vessel, of which Lewis was master, and that Lewis was entitled to the residue for his agency in the transaction out of which the proceeds grew; that they have paid to Lewis his proportion as determined by the referees, and that they still hold in their hands that part which was assigned to De Wolf and Smith. It is made to appear by the certificate of the chairman of the referees, (all the papers relating to the reference having been lost, and this certificate being made part of the answer of the trustees,) that the silks consigned to them by Lewis were part of the proceeds of sandal wood alleged by Lewis to have been given to him by the king of the Sandwich Islands. The referees determined, and we think rightly, that De Wolf and Smith being owners of the ship of which Lewis was master, they were entitled to a share, at least, of the property so given, as it was without doubt on account of the relation which Lewis bore to the ship and the voyage, that this present was made. But be that as it may, the question of property having been submitted, determined and acquiesced in by Lewis, it is to be considered now, that De Wolf and Smith were owners with Lewis, of the sandal wood when taken on board the ship, and of course were owners of the silks which were purchased with the proceeds, and are now entitled to the proceeds in the hands of the trustees, received under the order signed by all the parties.

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Upon this disclosure the counsel for the trustees contend;

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1. That at the time of the service of the plaintiff's writ there was no property in their hands belonging to De Wolf, or any debt due to him from them, it being altogether contingent whether they should ever be accountable to De Wolf for any part of the proceeds : —

2. That the property was in litigation, so that they could not, if they paid over to the plaintiff, defend themselves against the suit of De Wolf, if he should call on them for the proceeds according to the order before mentioned : — and

3. That whatever property or credits there may be, belongs to De Wolf and Smith as copartners, and that the trustees are not liable on this process to account to the creditors of De Wolf alone.

122 It appears from the disclosure, that writs have been served upon them in favor of other creditors of De Wolf alone, since the determination of the referees ; and also that writs have been served upon them by creditors of De Wolf and Smith jointly. The controversy, therefore, is between three classes of creditors, all aiming at the funds in the hands of the trustees ; — the plaintiff, who claims against them as trustees of De Wolf alone, his writ being served before the award of the referees ; — others, creditors of De Wolf only, whose writs were served after the award ; — and others, who claim as creditors of De Wolf and Smith jointly. This makes it important that the questions raised by the counsel should be carefully examined and rightly decided.

To support the first position, that at the time of the service of the plaintiff's writ there was no certain debt or accountability to De Wolf, or any property belonging to him in their hands, the decisions of this Court, which are familiar to the profession, have been cited ;* and they fully maintain the general proposition, that property or debts not actually due, but depending on a contingency, cannot be attached on the trustee process. This was one of the earliest constructions of our trustee process, and it has been steadfastly adhered to. The proposition itself is sufficiently simple, but the application of it

* *Frothingham* v. *Haley*, 3 Mass. R. 70 ; *Davis* v. *Ham*, ibid. 36 ; *Willard* v. *Sheafe*, 4 Mass. R. 236 ; *Wood* v. *Partridge*, 11 Mass R. 493 ; *Williams* v. *Marston*, 3 Pick. 65 ; *Grant* v. *Shaw*, 16 Mass. R. 343. *Reporter.*

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to particular cases which raise the question of contingent or not, is not always of easy solution. Thus much, however, may be considered as clear, that the contingency must affect the property itself, or the debt which is supposed to exist, and not merely the title to the property in the possession of the trustee, or his liability on a contract which he has actually made, but the force or effect of which is in litigation. Examples showing the distinction may be taken from the cases decided. Thus the wages of a sailor on board a vessel which has not arrived, are not liable to the process, because whether due or not depends on the arrival of the vessel. *Wentworth* v. *Whittemore and Tr.* 1 Mass. R. 471. So shippers of a cargo, under contract with the owner of the ship that he shall have a share of the net profits arising on the cargo, are not liable as trustees, until the termination of the voyage, as it is altogether contingent whether any thing will ever be due. 3 Mass. R. 33. There are many other cases of a similar character, but these two are sufficiently distinct, to show what is intended in the decisions by the term *contingent*, that is, an uncertainty whether any thing will ever come into the hands of the trustee, or whether he will ever be indebted, the uncertainty arising from the contract, express or implied, between the debtor and the trustee.[1] This principle has never been applied to a case where property is actually in the possession of the trustee, claimed by the debtor, his right to it being in controversy, nor to demands against the trustee himself in the nature of a debt due to the principal, which, however, may be in dispute between them. In such cases the process is considered as attaching, and is postponed until a liability to the debtor is ascertained. This, however, is subject to the restriction, that the trustee process shall be served before the party summoned shall be concluded, by the state of the pleadings, against showing in defence, that the debt or property is attached in his hands.

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This was settled in the case of *Howell* v. *Freeman and Tr.* 3 Mass. R. 121. It had been better perhaps originally, that

[1] See Revised Stat. c. 109, § 30; *Williams* v. *Marston*, 3 Pick. (2nd ed.) 66, note 1; *Faulkner* v. *Waters*, 11 Pick. 473; *Guild* v. *Holbrook*, 11 Pick 104.

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the commencement of a suit against the debtor should have exempted him from the trustee process, and it was so determined in the case of *Gridley* v. *Harraden*, found in the appendix of 14 Mass. R. *p.* 496. This case was decided in the year 1780, under the old provincial trustee act passed in 32 *Geo.* 2. Under the present existing statute, it has never been determined, that the mere commencement of a suit for a debt prevents the operation of the statute. On the contrary, this process has been maintained after such suit commenced, as in the cases of *Locke* v. *Tippets and Tr.* 7 Mass. R. 149; *Kidd* v. *Shepherd*, 4 Mass. R. 238; *Foster* v. *Jones*, 15 Mass. R. 185.[2] These cases are cited in Bigelow's Digest, as showing that the mere commencement of a suit bars the
124 trustee process; but neither of them maintains the position, except the case of *Gridley* v. *Harraden*, which was decided before the present act was passed. But if it were true that the commencement of a suit would have that effect, this case would not be influenced by that principle; for the trustees in this case have not been sued, nor have they any controversy about the property. They are stakeholders, ready to pay to whoever has the right. They hold the proceeds in trust for Lewis, De Wolf or Smith, as the referees shall award. There is no contingency as to the property, but merely as to the title, and that, as before observed, does not discharge them from the suit. They have had full opportunity to disclose, so that a judgment against them in this action will be a bar to any action by De Wolf for his share of the proceeds in their hands.

It is objected, however, that De Wolf and Smith being jointly interested in these funds, the respondents are not the debtors of De Wolf alone, and therefore are not liable in this suit, in which De Wolf is a sole debtor. This depends altogether upon the question whether De Wolf and Smith are copartners; if they are, the objection is well taken, as was decided in the case of *Fisk et al.* v. *Herrick and Tr.* 6 Mass. R. 271, and *Upham* v. *Naylor and Tr.* 9 Mass. R. 490.[1]

[2] See Revised Stat. *c.* 109, § 31, 32, 33.

[1] See *Hawes* v. *Langton*, 8 Pick. 70; *Church* v. *Knox*, 2 Connect. R. 514 Cushing on Trustee Process, 93 to 100, 44 to 48; *Lyndon* v. *Gorham*, 1 Gallison, 367.

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These cases, however, relate to copartnerships properly so called, and not to mere tenancies in common or joint ownerships of personal property; and the reason is, that no one partner can have any separate interest in a copartnership debt, if he himself is indebted to the copartnership to an amount which will absorb his proportion; so that his share shall not be taken, until it shall be made to appear that it is free from the lien of the other partners. But it is not so with tenants in common of a ship, or persons jointly interested in a cargo, they not being partners, for they have no lien upon each other's share,[2] and are not answerable for each other's debts. And this has been settled in several cases similar to the one before us. Where A and B were owners of a cargo in distinct proportions, sold in Calcutta, and the proceeds were invested in a return cargo, and B carried on trade for himself, unconnected with A in trade, it was held that they were not partners in the transaction. *Holmes* v. *United Ins. Co.* 2 Johns. Cas. 329. 125
In another case of a joint interest in a voyage, it was determined, that admitting there was a partnership in respect to the outward voyage, yet it terminated with the sale of the cargo, and the interests in the return cargo became separate and distinct, each party being entitled to his proportion, without any concern in the profit or loss which might ultimately arise. *Post* v. *Kimberly*, 9 Johns. R. 470.*

Now what is the interest of De Wolf in the funds in the hands of Sargent and Brooks? Smith and De Wolf were the owners of a ship, and concerned together in a voyage. It is to be presumed that each furnished his share of the outward cargo. The ship brings home silks, which, by reason of Smith and De Wolf being ship-owners, become their property. They are tenants in common until the property is divided.[1] When sold, they have the same interest in the proceeds. Neither can claim more than his share on account of debts due from the other. They have no lien. The consequence is, that a creditor of either may attach a moiety, and

[2] See *Merrill* v. *Bartlett*, *ante*, 47, note 1.

* On this point the counsel for the trustees cited *Nicoll* v. *Mumford*, 4 Johns. Ch. R. 522. *Reporter*. [See Collyer on Partn. (1 Am. ed.) 13, 14, n. 6.]

[1] See 3 Kent's Comm (3d ed.) 157; *Jackson* v. *Robinson*, 3 Mason, 138.

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when sold by a factor, though he may discharge himself by payment to either, if they united in the deposit, he is nevertheless debtor to each, and is answerable to the creditor of each when the funds are attached in his hands.

Trustees charged.

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126 ELIZABETH ANDREWS, Executrix, *versus* WILLIAM C. HUNNEMAN *et al.*

If the subject of a specific legacy is in the possession of the legatee at the death of the testator, the acquiescence of the executor in such possession is sufficient to vest the property in the legatee, if there are assets enough to pay the debts, without any formal assent.

ASSUMPSIT for goods sold and delivered.

The goods in question were tools of a brass-founder. They formerly belonged to George C. Andrews, who on becoming insolvent assigned them to his father, the testator, to whom he was largely indebted. They were removed from the shop of George to a shop belonging to the testator, and the business of a brass-founder was carried on there by George on the testator's account.

In the will, proved March 21, 1825, the testator says, "if my son George should not be entitled, on settlement of accounts between him and me, to receive back the tools which he assigned to me on the 10th day of January, 1823, by virtue of said assignment, I bequeath the said tools, or so many of the same as remain, to him, for his use and behoof for ever."

After the death of the testator, the tools were in the shop belonging to his estate, and George had free access to them, but he did not incline to carry on the business. He sold one or two of the articles, before the sale to the defendants, but it did not appear that he had the consent of the executrix therefor. He spoke of them as his own, and offered to sell them to one Keith. On the 17th of September, 1825, he sold and delivered them to the defendants, and made and delivered a bill of parcels thereof in his own name. In the bill of pa

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cels were three articles not among the assigned goods, but which were made by an apprentice of George after the assignment, and while the business was carried on under the testator.

Henry P. Andrews, a brother of George, testified that the goods were sold by George as agent, but it did not appear that the witness was present at the sale; but he said there were frequent conversations between the executrix and George, 127 respecting the sale of the goods for the purpose of paying some debts of the estate. He called upon Hunneman for the pay, in behalf of his sister, the executrix, and Hunneman said he had not the money, but would pay on the next Friday. The witness stated to Hunneman, that the money was wanted towards payment of a particular debt from the estate. The tools had been appraised as part of the estate. The witness stated that he, and the family generally, knew they were sold by George.

Mr. Rogers, a counsellor at law, testified that the executrix asked his advice, whether she could safely let George have the tools before the debts were paid, and he advised her, that if she let him have them, she ought to take an accountable receipt for them, so that they might not appear to be delivered under the will.

The estate was not insolvent, but of the whole property, real and personal, there was a surplus for distribution, of thirteen or fourteen thousand dollars, after payment of debts; but the personal estate was not sufficient to pay the debts.

The *Chief Justice* instructed the jury, that with respect to the tools included in the assignment, the case must turn upon the question, whether the executrix had delivered them to George pursuant to the will, or suffered him to retain possession and dispose of them as his own because specifically bequeathed to him; which was a question of fact for them to determine; that with respect to one of the articles not included in the assignment, as it was made by the apprentice of George while the business was carried on for the father, the apprentice being, as was proved, boarded by the father, that would be the property of the father. No particular instructions were given respecting the two other articles not included in the assignment.

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Andrews v. Hunneman.

The verdict was for the plaintiff for the whole amount of the bill, including all the articles sold. The defendant moved for a new trial, because the verdict was against the evidence, and contrary to law on the facts above stated.

March term 1827.

Sullivan insisted that the evidence did not support the declaration, there being no proof that the legatee did not make the sale on his own account.

128 But the executrix was a mere trustee to perform the will, and she had no right to dispose of a specific legacy for the payment of debts, there being without it sufficient assets, real and personal. ***Farrington*** v. ***Knightly***, 1 P. Wms. 549 ; ***Winship*** v. ***Bass***, 12 Mass. R. 199 ; ***Hays*** v. ***Jackson***, 6 Mass. R. 149.

This legacy, vested at the decease of the testator, subject only to his debts, and the legatee might take possession as soon as the executor assented. The evidence in the case shows an assent on the part of the plaintiff. ***Kirby*** v. ***Potter***, 4 Ves. 751 : ***Williams*** v. ***Lee***, 3 Atk. 223 ; ***Atkins*** v. ***Hill***, Cowp. 288 ; Com. Dig. ***Administration***, *C* 6 ; ***Colebourn and Mixstone's Case***, 1 Leon. 130.

Should the plaintiff recover, it would be to the use of the legatee, that is, of the defendant who purchased of him ; therefore to avoid circuity of action she shall not prevail. ***Turner*** v. ***Davies***, 2 Wms's Saund. 149, and note 2.

The verdict is wrong as it respects the three articles made by the apprentice. There was no evidence that he or his services had been assigned to the testator, so that what he made must have belonged to George C. Andrews. ***Nickerson*** v. ***Howard***, 19 Johns. R. 113 ; Co. Lit. 117 *a*, Hargr. note 161.

Hubbard and ***Sewall***, for the plaintiff. The law is clear, that the legatee was not entitled to the legacy without the assent of the executrix ; Toller, 306 ; and she had authority to dispose of it for the payment of debts. Toller, 256 ; ***Ewer*** v. ***Corbet***, 2 P. Wms. 148. No case has been cited for the position, that real estate is to be applied to the payment of debts, before a chattel specifically devised. If a specific legacy is taken when the estate is not insolvent, the legatee is entitled to contribution.

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As to the verdict's being against the weight of evidence, the question was, whether the plaintiff had assented to the legacy, or whether the legatee sold the tools as her agent; and the jury have found, and we think rightly, in favor of the plaintiff. There was no evidence of her assent. But if the verdict was against the weight of the evidence, the Court will not grant a new trial, there having been evidence on both sides; more especially as there was only presumptive evidence. *Blanchard* v. *Colburn*, 16 Mass. R. 347; *Hammond* v. *Wadhams*, 5 Mass. R. 355; *Swain* v. *Hall*, 3 Wils. 45; Grant on New Trials, 148.

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The tools made by the apprentice were made out of the stock of the testator, and so belonged to him; the only claim of George C. Andrews would be for the labor of his apprentice.

The opinion of the Court was delivered by

March 29th, 1828.

PARKER C. J. It seems to be well settled in the law, that in a specific devise of chattels, though the right vests at the death of the testator, yet the assent of the executor is necessary to enable the legatee to obtain possession.[1] At the common law, and this founded upon the liability of the executor for debts, he has a right to refuse the legacy until he has ascertained whether there are assets.

It is therefore held to be necessary to go into chancery to obtain payment of a legacy, where there will be an account and discovery of assets, and a decree of payment if those be found sufficient. Now, at the common law, an action lies for a legacy on a promise to pay, there being a sufficiency of assets. Cowp. 288.[2] And trover will lie for a specific legacy after an assent of the executor. 3 Atk. 223. An assent will be presumptive evidence of assets. By our statute of 1783, *c.* 24, § 17, [Revised Stat. *c.* 66, § 16,] an action a law is given for a legacy. But this action will not lie immediately on the death of the testator, because it may not be known whether there are assets sufficient for the debts, unless

[1] See *Wilson* v. *Rine*, 1 Harr. & Johns. 139; *Hairston* v. *Hall*, 3 Call. 188.

[2] See Ram on Assets &c. 508 to 512 (No. 23 Law Libr. *p.* 235 to 238); 1 Story's Comm. Eq. 554.

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Andrews v. Hunneman.

there is an assent ; and by parity of reason, a legatee will have no right to take the thing devised out of the hands of the executor, until the latter has had time to know the condition of the estate. But if the thing devised is in the legatee's possession at the death of the testator, then an acquiescence in such possession is sufficient to vest the property in the legatee, if there are assets, and a formal consent cannot be necessary ; so that if he sells or disposes of the thing devised, the purchaser will hold, under such circumstances.[3]

Now in the case before us, the tools given by the will were
130 in the possession of the vendor, who was the legatee, before and at the death of the testator ; so that a delivery to him by the executrix was not necessary. Nothing more than her acquiescence in the continuance of the possession by him was requisite. He claimed them as his own, and had offered to sell them, and this was known to the family generally, including the executrix. She never interfered, but on the contrary, having been told by counsel that her consent would vest the property, if she did not take an accountable receipt, she suffered them to remain without taking such receipt or asking for one. There was nothing to encounter this evidence but loose conversations by which the defendant was not bound, and the demand of payment for the articles for the executrix, and his promise to pay. But he had received a bill of parcels in the name of George Andrews alone, having purchased of him without any intimation of his selling as an agent for the executrix. This promise to pay is wholly immaterial to the question of the right of George to sell, in any other view than as it might show that the defendant knew the sale was made for the executrix, which was not suggested to be the case. We think a new trial ought to be granted, on the ground that the verdict is strongly against the weight of evidence.[1]

[3] Where A, the legatee of a term, enters and occupies for a short time and then quits the possession, it is a question for the jury whether the executors have or have not assented to the bequest; and if a party contracted with A for an underlease, it may be left to the jury to say whether the contract was made with A in his own right or as agent to the executor. *Richardson* v. *Gifford*, 3 Nev. & Man. 325; *S. C.* 1 Adolph. & Ellis, 52. See also 2 Roberts on Wills, 107 to 109; 2 Williams on Executors, 843 *et seq.*

[1] A verdict will not be set aside as contrary to evidence, unless there is a

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With respect to two or three of the articles made while George Andrews was working with his father, they would seem not to be comprehended within the words of the bequest, for that refers only to the tools which had by George been conveyed to the father; and for these we do not see but the plaintiff is entitled to recover.

New trial granted.

JOSEPH BRYANT *et al. versus* COMMONWEALTH INSURANCE COMPANY. 131

The owner of goods insured cannot abandon on account of the vessel's being disabled in the course of her voyage, if upon the whole it is reasonable, taking into view the nature of the voyage and the time, expense and risk of sending on the cargo, that the master should procure another vessel for that purpose, although he should not be able to do it at the port of distress or one contiguous, and although it should be necessary to make use of land carriage to reship the goods.

Insurance on coffee, sugar and tea from Havana to Castine in Maine. On the 28th of December the vessel stranded at the Washwoods, on the coast of Virginia, about 40 miles from Norfolk, and the goods were landed without damage. The assured received a letter from the master on the 8th of January, relating the accident, and on the same day an abandonment was tendered but refused. The master, without waiting to hear from the assured, on the 11th of January sold the goods on the beach for 11,544 dollars. The invoice value was about 11,850. The duties paid by the master (5,390 dollars), the wreck master's commissions on the sales (577), and the expense of saving the goods (300), amounted to 6,267 dollars. The goods might have been carried to Norfolk by land in three or four days after the accident, and thence shipped in another vessel to the port of destination, for 3,859 dollars, but the master made no attempt to send them on. It was considered that the loss was not affected by the duties, and it was *held* that the master was not authorized to make the sale and that the assured had no right to abandon, as the expenses of saving the goods and sending them on to the port of destination would have been less than fifty per cent of the invoice value.

A usage for the master of a vessel stranded, to sell the cargo without necessity, is void.

Claims for a general average loss and a total loss may be joined in one count.

Where a policy provided that a loss should be paid in sixty days after proof and adjustment thereof, and the assured gave notice of a total loss more, and of a general average loss less, than sixty days before bringing his action, it was *held* that in respect to the general average loss the action was premature.

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decided preponderance against the verdict. *Smith* v. *Hicks*, 5 Wendell, 48; *Jackson* v. *Loomis*, 12 Wendell, 27; *Rundell* v. *Butler*, 10 Wendell, 120; *Lewis* v. *Payn*, 4 Wendell, 423; *Fowler* v. *Ætna Ins. Co.* 7 Wendell, 270; *Johnson* v. *Scribner*, 6 Connect. R. 185; *Cassels* v. *State*, 4 Yerger, 149 *Williams* v. *Gilman*, 3 Greenl. 276

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ASSUMPSIT on a policy of insurance, dated November 11, 1824, by which the defendants caused the plaintiffs to be insured 9,600 dollars on the cargo, and 400 on the freight, valued at 800, of the schooner William King, at and from Havana to her port of discharge in the United States.

At the trial before *Wilde* J. it appeared in evidence, that the schooner sailed from Havana on the 30th of November, 1824, bound for Castine, having on board 500 bags of coffee, 50 boxes of sugar, and six chests of tea, the whole of which, as well as a part of the vessel, was the property of the plaintiffs. After being several days at sea, she was compelled by
132 stress of weather, the death of the mate and sickness among the crew, to bear away for the port of Charleston for repairs, and for a new crew, where she arrived on the 7th or 8th of December. Certain repairs were there made and a new crew shipped, and to defray the expenses the master sold 40 bags of the coffee for 660 dollars and 80 cents, exclusive of the duties and charges. The schooner sailed from Charleston with the remainder of her cargo, on the 18th or 19th of December, and on the 28th she was cast ashore, by stress of weather, at the Washwoods, on the coast of Virginia, about forty miles from Norfolk. She sustained no material damage by stranding. On the second or third day afterwards all her cargo was landed on the beach, with but little if any damage, where it remained until the 11th of January, 1825, when it was sold, as was the schooner also, by the wreck master, by order of the master of the schooner, for the benefit of the owners, underwriters, and others concerned. The cargo and vessel were advertised for sale in the Norfolk newspapers of the 3d of January. Having completed the sales and received the proceeds, the master went to Norfolk, where he paid the duties on the cargo to the collector of Norfolk, on the 15th of January, amounting to 5,390 dollars. From thence he proceeded to New York, where he had a wife and child. He has ever since, as it is believed, kept himself fraudulently concealed, has not paid the proceeds of the cargo and vessel to either the plaintiffs or the defendants, and neither party has been able to find him. The master and mate on the outward voyage died at Havana, and the master on the voyage from that port was a

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stranger to the parties. He was appointed by the plaintiffs' correspondents, being well recommended by the master of the ship Comet of New York, of which he was chief mate. The news of the stranding was first learned by the plaintiffs on the 8th of January, by a letter from the master, which was communicated to the defendants, and on the same day an abandonment was tendered to them and by them refused.

No notice was given to the defendants of the schooner's bearing away for Charleston, nor any demand made for the general average loss thereby sustained, until the 9th of March; 133 and the papers then communicated were the bills of expenses at Charleston, and the survey and protest. The action was brought on the 16th of April.

The plaintiffs claimed to recover for two distinct losses, a general average loss at Charleston, and a total loss by the stranding at the Washwoods.

The defendants resisted the claim for the loss at Charleston on two grounds; first, that there was no count in the declaration which could embrace this loss; and, secondly, that the company were not liable to be sued for it until sixty days after notice and an adjustment of it, the words of the policy being, "And in case of loss, &c. such loss shall be paid in sixty days after proof and adjustment thereof." The judge however overruled the objections, reserving them as questions of law; and the jury found a verdict for the plaintiffs for this claim.

The defendants resisted the claim for a total loss on two grounds:—

First, that the vessel was intentionally and fraudulently stranded by the master. But the jury found that she was stranded and totally lost without fraud or fault to be imputed to him.

Secondly, that the cargo being landed on the beach with trifling damage, if any, and in a condition to be transported to Castine, its port of destination, it was the duty of the master thus to send it on, (and not to sell it,) if he could effect it at an expense short of one half of its value.

The cost of the cargo at Havana (including the six chests of tea, which were a part of the outward cargo) was 12,512

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dollars; and deducting 660 dollars, the net proceeds of 40 bags of coffee sold at Charleston, the balance is 11,852 dollars. The gross amount of the sales of the coffee, sugar and tea at the Washwoods, was 11,544 dollars; from which deduct 5,390 dollars (paid for duties) and there will remain 6,154 dollars; but deduct 577 dollars, commissions of 5 per cent. on the sales, and 300 dollars, the estimated expense of saving the property, (amounting together to 877 dollars,) and there will remain 5,277 dollars.

The defendants introduced evidence tending to prove, 134 that it was in the power of the master to take on his cargo to the port of destination in four different ways. 1. By getting the schooner off and putting the cargo on board. 2. By procuring another vessel to proceed to the Washwoods and take the cargo on board. 3. By transporting the cargo by land to Norfolk, and thence shipping it to Castine. And 4. by transporting it to the North Landing or some place on the waters of Currituck Inlet, and thence shipping it to Castine. The jury did not find which of these modes was most practicable, but they found generally that it would have cost 3,859 dollars to transport the cargo from the place of stranding to Castine, exclusive of any deduction or discount of the freight for the original voyage.

In regard to the vessel, the master caused no survey to be made, consulted no one about the practicability of getting her off, made no attempt to that effect, nor manifested a disposition to make any. The same remarks are applicable as to any attempt or disposition to transship or otherwise transport the cargo to its port of destination.

On the part of the plaintiffs it was insisted, that there was a usage to sell on the spot, goods cast on that shore, of whatever description, and particularly groceries, and that by this usage and the situation of the property at that season of the year, and under the circumstances in which the master was placed, he was authorized to sell on the beach for the benefit of all concerned. Evidence was introduced on both sides in regard to this usage, but there was no testimony that it was known to the parties, or to underwriters, merchants or navigators at Boston, at the date of the policy. The jury were in

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struc ted, that if they found the usage would authorize the master to sell under the circumstances proved, they might return a verdict for the plaintiffs as for a total loss, the point being reserved, under the defendant's objections to it, as a question of law. The jury found that the usage did authorize the sale, and returned a verdict for a total loss in cargo and freight.

The evidence respecting the usage and the expense of transporting the cargo from the Washwoods to Castine, was contained in depositions to be referred to by the Court.

If the Court should be of opinion that the verdict, either for 135
a partial or a total loss, was against the evidence, a new trial was to be granted. If they should be of opinion, that independent of the usage, the facts found by the jury proved only a partial loss, a new trial was to be had, or a judgment rendered for a partial loss, as the Court might order; unless they should be of opinion that the usage was sufficiently proved and was valid, so as to authorize the master to sell the cargo and thereby constitute a claim against the defendants for a total loss.

In regard to the general average expenses at Charleston, judgment was to be rendered for the amount to be settled by the respective counsel, unless one or both of the points of law reserved on this head should be decided in favor of the defendants, or unless a previous average loss from expenses paid out of the property insured, should be considered as merged in a subsequent loss.

Prescott and *Orne*, for the defendants. As the declaration *March 10th*
contains but one count, the object of which appears to be to claim for a total loss, the plaintiffs cannot recover for the general average loss. Where distinct losses are claimed, there ought to be a distinct count for each.

The defendants were not liable to an action for the general average loss, until sixty days after "proof and adjustment thereof." The meaning of *adjustment* may not have been judicially determined, but we think it implies that the insurers should be furnished with all the documents necessary to enable them to settle the loss. At least they should receive a statement of all the interests liable to contribute.

The principal question is, whether there was a total loss.

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The cost of the cargo, deducting the cost of the 40 bags of coffee which were sold at Charleston, was more than 11,600 dollars, and the jury have found that the cost of transporting it from the Washwoods to Castine would have been 3,859 dollars. The verdict is against the evidence in finding the expense so great, but even this expense would not justify an abandonment, as it does not amount to 50 per cent. on the invoice value of the goods. Further, as the expense of transportation from the intermediate place would have exceeded the amount of the freight from Havana to Castine, the goods would not have been liable for the original freight. *Searle* v. *Scovell*, 4 Johns. Ch. R. 218. The plaintiffs may contend that the amount of the sales on the beach is to be considered as the value of the cargo; but that cannot be the criterion, for a vessel may be stranded where there is no market for the goods. The value before the accident must be taken, as that was the interest at risk. *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 49; *Ludlow* v. *Columbian Ins. Co.* 1 Johns. R. 335. In ascertaining whether there was a loss to the amount of 50 per cent., the commissions of the wreck master should be rejected, as that expense would have been avoided, if the cargo had been carried to Castine. On the day of the abandonment the loss was but partial, and if it became total, it was in consequence of a subsequent sale. But the master was not authorized to make the sale, either by law or usage. Not by law, for there was no necessity for selling. The cargo was not perishable, after it was landed, and might have been transported without any hazard to Norfolk. The master might have procured the funds necessary for that purpose, either by pledging or selling a part of the cargo. *Murray* v. *Hatch*, 6 Mass. R. 476; *Underwood* v. *Robertson*, 4 Campb. 138. And as to the supposed custom, if it was binding, it must be as a usage known and notorious, so as to have entered into the contract, — or as a local law, because the property went within the jurisdiction of Virginia. There was no evidence that such a usage was known here, so that it could not have entered into the contract, and as a local law it would affect only contracts made in Virginia, or with reference to the laws of that State. *Power* v. *Whitmore*, 4 Maule & Selw. 141;

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Smith v. *Wright*, 1 Caines's R. 45 ; *Lewis* v. *Thatcher*, 15 Mass. R. 431. But a usage like the one in question could never have a lawful origin. A sale for the first time, under like circumstances, being unnecessary, would be a violation of the master's duty, and a repetition of such violations could not make them legal. The authority of the master to sell, whether derived from law or usage, can be exercised only where he has no opportunity to consult the owners. *Cocksedge* v. *Fanshaw*, 1 Doug. 132 ; *Tremenhere* v. *Pasco*, 3 Keb. 91 ; Vin. *Customs*, *H* 17 ; *Homer* v. *Dorr*, 10 Mass. R. 26 ; 1 Johns. R. 335 ; Condy's Marsh. 270, 707 ; Phillips on Ins. 14 *et seq.* ; *The Gratitudine*, 3 Rob. Adm. R. 240 ; *Milles* v. *Fletcher*, 1. Doug. 231 ; *Bell* v. *Nixon*, 1 Holt's N. P. Rep. 423 ; *Read* v. *Bonham*, 3 Brod. & Bing. 147 ; *Thorneley* v. *Hebson*, 2 Barn. & Ald. 513 ; *Wilson* v. *Millar*, 2 Stark. R. 1 ; *Hayman* v. *Molton*, 5 Esp. R. 65 ; 1 Emerig. 427, *c.* 12, § 16 ; *Gordon* v. *Mass. F. & M. Ins. Co.* 2 Pick. 262. But if the Court should think a custom would authorize the sale, the finding of the jury that there was a custom was not warranted by the evidence. 137

The counsel also contended, that the plaintiffs could not recover for a total loss, for that it was proved that the cargo might have been transported to its place of destination in either of the four ways mentioned in the statement of the case, and for a sum less than half the value of the goods.

Shaw and *Hubbard*, for the plaintiffs. The declaration, though containing but one count, is sufficient. It sets forth one entire contract to indemnify against all losses, and states the two losses which have actually happened, with a general claim of damages. It may be compared to a count upon a promissory note payable by instalments, where all the instalments have become due.

If the claim for a total loss more than sixty days before bringing the action, is not to be considered as including the general average loss, the consequence will be merely, that the latter must be made the subject of a new action.

Had the plaintiffs a right to abandon on the 8th of January . This must depend upon the facts existing at the time. The Washwoods is a small village containing sixty or seventy

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houses. It is about forty miles from Norfolk by land, and sixty by water. The stranding was in the winter, at a place where there was no shelter for the cargo, nor any means of making one; and the cargo, consisting of coffee, sugar and tea, was liable to be injured by exposure to the weather. The master was at a great distance from the owners, and was obliged to govern his conduct by the immediate circumstances.

138 The abandonment was made as soon as the owners heard of the loss. The defendants do not deny, that where the goods are injured 50 per cent, the assured may abandon; but there are other reasons which will authorize an abandonment. If the adventure is put in so great hazard as to make it not worth pursuing, which was the case here, that is a sufficient reason, independent of any damage to the property. But the assured cannot abandon on account of the mere retardation of the voyage. *Goss* v. *Withers*, 2 Burr. 683; *Milles* v. *Fletcher*, 1 Doug. 231; *Hamilton* v. *Mendes*, 2 Burr. 1198 and 1 W. Bl. 276; *Manning* v. *Newnham*, Park on Ins. (3d ed.) 168; *Anderson* v. *Wallis*, 2 Maule & Selw. 240; *Barker* v *Blakes*, 9 East, 283; *Mitchell* v. *Edie*, 1 T. R. 615; Phillips on Ins. 412 *et seq.*; *Gernon* v. *Roy. Exch. Ass. Co.* 1 Holt, 49, 2 Marshall, 92, and 6 Taunt. 383; *Hudson* v. *Harrison*, 3 Brod. & Bing. 105. Where the deterioration of the goods is the only ground of abandonment, it is immaterial at what rate they are valued; but where other circumstances are joined, the rate becomes material. We contend that the value in the present case is the amount of the sales, and that the loss sustained was more than half that value. The circumstance of its being feasible or not, to get the vessel off, is of importance in ascertaining the right to abandon. It was well proved, that it was not advisable to attempt to get off this schooner, at least in the winter season. Neither was it practicable to send another vessel, at that season, to the place of stranding, to take the goods on board. The master was not bound to look beyond the place of distress or a contiguous port, for another vessel. *Saltus* v. *Ocean Ins. Co.* 12 Johns. R. 107; *Whitney* v. *N. Y. Firemen Ins. Co.* 18 Johns. R. 208; *Treadwell* v. *Union Ins. Co.* 6 Cowen, 270. It was not expedient to transport the goods to some place on Curri

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uck Inlet, which is in another collection district. They could not have been carried there without giving bonds for the duties, as otherwise they would be liable to forfeiture, and the law will not oblige the master to give bonds. There was no alternative then but to transport them to Norfolk by land, or sell them on the beach. The master was not bound thus to remove them to Norfolk and incur the certain and probable expenses of such removal. The different estimates of different witnesses as to the value of the goods and the expense of transporting them, show the difficulties under which he labored. It was not in his power to make a better estimate than the Norfolk merchants who have testified in the case. He had no funds to pay the expenses of transportation. It is said that he might have obtained funds by pledging the goods ; but if he could not sell, he could not pledge. And if the goods had been taken to Norfolk, the duties must have been secured, and a commission have been paid to the bondsmen, or money to pay the duties must have been raised by a sale. Securing or paying the duties at Norfolk would have made that the port of discharge, and so the plaintiffs would have been obliged to get a new policy to cover the transportation from that port to Castine.

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In regard to the usage, the presumption is that the insurer is acquainted with the course of business, and that he acquiesces in it, unless he expresses his dissent ; that he agrees, if the cargo is cast on shore where there are commissioners of wrecks, it shall be disposed of in the usual manner. It is objected to this, that here were means of carrying on the cargo ; but the like means have existed when other goods have been cast ashore at this place, and the usage to sell is evidence that the master adopted the course most beneficial for all concerned. *Palmer* v. *Blackburn*, 1 Bing. 61 ; *Stewart* v. *Bell*, 5 Barn. & Ald. 238.

Whether the loss by the fraud of the master is to be borne by the plaintiffs or the defendants, depends on the question whether the abandonment was valid ; as from the time of an abandonment the master becomes the agent of the underwriter. *Lee* v. *Boardman*, 3 Mass. R. 247 ; *Mitchell* v. *Edie*, 1 T. R. 608.

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Orne in reply. The want of funds to transport the cargo cannot be set up by the plaintiffs as a ground of abandonment, since the master made no attempt to raise money for that purpose; but having the cargo under his control, he might easily have obtained the sum requisite. He was bound to make all reasonable exertions to transport the cargo to Norfolk; and if
140 he had carried it there, which he might have done for 2000 dollars, there would have been no cause for an abandonment. A sale there would have produced from 40 to 70 per cent more than the sale on the beach. It is not decided in any case, that a master is not obliged to have recourse to land carriage, and courts would hesitate before they should adopt such a principle. There can hardly be an instance of stranding where some land carriage will not be required. It is objected that the master would have been obliged to bond the goods, if he had carried them to Norfolk. He did not consult with the collector on that subject; if he had, it cannot be supposed that there would have been any difficulty in making an arrangement. Entering the goods at Norfolk would not have made it a "port of discharge," within the meaning of the policy. The authorities respecting abandonment for a loss of the voyage, have no bearing on this case, as here the adventure was manifestly worth pursuing.

March 29th. PUTNAM J. delivered the opinion of the Court. The principal question in this case is, whether, upon the facts proved, the verdict for a total loss can be supported.

It is found that the schooner was cast on shore by stress of weather, and without any fraudulent intent of the master, on the 28th of December, 1824, at a place in Virginia called the Washwoods. The vessel was not bilged, and the cargo sustained little or no damage by the stranding. The plaintiffs received a letter from the master on the 8th of January, 1825, giving information of this loss, and on that day they offered to abandon. The facts and circumstances attending the property at that time, must determine the rights of the parties as to making an abandonment. The cargo was not damaged, but the plaintiffs claim for a total loss on the ground that the voyage was lost by reason of the stranding of the vessel; and that the master was authorized, from the necessity of the case.

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to sell the cargo on the beach, and thus to put an end to the voyage. The defendants contend that this proceeding of the master was not warranted. They contend that the schooner might have been got off and the voyage completed with her, and that the cargo might by other means have been carried to the port of destination. In point of fact it was carried by 141 land to Norfolk, by the purchasers, and it is proved that vessels might have been procured there to carry it to Castine.

Whether the schooner could have been got off or not, or whether another vessel could have been procured and brought to the Washwoods to receive and transport the cargo to Castine, or whether it could or could not have been carried by land to the North Landing, and from thence shipped in another vessel for Castine, is left doubtful upon the evidence, and is not settled by the jury. They only state the amount of the expense of completing the voyage, but do not give the items, nor state in which mode the voyage could have been best accomplished.

The law authorizes the master, in cases of shipwreck, stranding or other disasters which may happen without his fault, in the course of the voyage, to act for all parties interested, in their absence. If the ship should be stranded, it would be his duty, in behalf of the owner of the ship, to get her off and prosecute the voyage, if it could be done at an expense not exceeding half her value. So, if that could not be done, he has authority to procure another ship to carry the cargo to the port of destination. If the cargo were damaged by the stranding not exceeding one half the invoice value, it would be the duty of the master, as representing the owner of it, to cause it to be reladen on board the ship, if that were in a condition to transport it, or if not, on board any other ship which he could procure upon reasonable terms, on account of the ship-owner, to the end that the ship-owner may earn his freight, and the merchant have his goods at the port of destination. [1] The master, in short, is, in such cases of disaster, to act reasonably and honestly, with a view to save the prop-

[1] See *Hunt* v. *Royal Exch. Ass. Co.* 5 Maule & Selw. 47; 2 Phillips on Ins. 303 304.

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erty and to perform the voyage. *Schieffelin* v. *N. Y. Ins. Co.* 9 Johns. R. 21, and cases there cited.

These general principles are not supposed to be controverted. If it should be admitted that the ship could not have been got off, and that there was no other mode of performing the voyage than by transporting the cargo to Norfolk and

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shipping it from thence to Castine, and that the cost would amount to the sum (3,859 dollars) which the jury have fixed, the question would recur, if that state of things authorized the master to break up the voyage by a forced sale.

The whole cargo (deducting the 40 bags of coffee which were disposed of at Charleston to pay for the general average loss) amounted to 11,851 dollars. It has been contended for the plaintiffs, that duties were payable at the port of the district where the stranding happened, and that the master was not obliged to give his bond to pay them. There are some authorities which decide that duties are not to be paid upon goods which are wrecked, but only on such as are voluntarily imported and landed. *Peisch et al.* v. *Ware et al.* 4 Cranch, 355. But if duties were demandable at Norfolk, the master, it must be supposed, might have raised the money by pledging the goods; or he might have stored the goods (which were sound and not in a perishable state) and waited until he could have received funds from his owners at Boston. He could communicate with them by the mail in eight or ten days. If there were no other difficulty than the want of funds, it seems to us, that being so near his owners, he should have given them an opportunity to furnish them without a forced sale. It could make no material difference to the owners, whether the duties were paid or secured at the port of distress or at the port of destination. If they were paid at the former port, a certificate and permit would be granted for the exportation of the goods to the port of destination, and no duties would be required to be paid there. So in regard to the expense of transportation from the Washwoods to Norfolk, it is not to be supposed but that money could have been procured for that purpose without a sale of the whole cargo. If the stranding had been in a foreign country, where no facilities of transportation could be procured, and no credit obtained, and ready

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money should have been required for all the scanty aid that could be obtained, it would present a very different case. But this disaster happened within forty miles of one of the most convenient ports in the United States, where there are respectable mercantile houses, who would without doubt gladly have taken charge of this property and made the necessary advances, for the usual commissions, and the cargo could have been speedily transported thither by land.

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But it has been contended for the defendants, that the master was not bound to transport the cargo so great a distance by land ; and on the authority of the cases in New York, that he is not obliged to go beyond the port of distress, or a port contiguous or near at hand. It happens that Norfolk is in the same district in which the goods were landed. We do not however rely upon that point. It seems to us very difficult to lay down any geographical rule which could have a general application. And in the cases where the operations of the master have been so limited in New York, there were other circumstances which would have justified the conduct of the master in breaking up the voyage. Thus in *Saltus et al.* v. *Ocean Ins. Co.* 12 Johns. R. 107, the bulk of the cargo consisted of hemp, which could not be taken out in bales, and the rebinding and restowing it in another ship would have been equal to its value. And besides, there were no machinery and screws to compress it ; so that it would have required three or four vessels to carry on the hemp from Kinsale (the port of distress) to New York. These circumstances would fully have justified the master in not hiring several vessels, which might have been procured at Cork (which was sixteen miles from Kinsale), to carry the cargo to New York.

So in *Treadwell* v. *Union Ins. Co.* 6 Cowen, 270, where the ship was disabled and no ship could be obtained in port, *Woodworth* J. says, if there be a vessel in the same or a contiguous port, the duty of the master to procure it to carry on the cargo, is clear ; the rule is imperative. But if resort must be had to distant places, and, independently of procuring a vessel, *there are further serious impediments in the way of putting the cargo on board*, the rule is not obligatory.

After all, it becomes a question of reasonable care and con-

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duct on the part of the master, and like other questions of that nature, after the facts are found, the law arising from them will be pronounced by the Court. [1]

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It may happen that a vessel might be procured at a port in another State, and not geographically contiguous to the port of distress, in convenient time and upon more reasonable terms, than one could be had in the port of distress. We should not therefore be disposed to limit the operation of the master to any particular port or place, in regard to procuring another vessel; but to require him to do so, if upon the whole it should seem reasonable, taking into view the nature of the voyage and the time, expense and risk of the transportation to the port of destination.

But it has been said that no case has been produced where the master has transported the cargo forty miles to re-ship it The testimony on the part of the plaintiffs proves that cargoes have been transported to Norfolk from the Washwoods, without having been sold there. Peter Lane mentions one instance of the transportation of a cargo of rum and sugar. William Lyford states another, of a cargo of cotton carried by land to Norfolk, where the consignee resided. Some transportation by land is necessary to reload the goods which have been cast on shore. It may happen that the transportation by land forty miles to a convenient port, might be more safe and expedient, than a transportation for a less distance to an open roadstead, for the purpose of re-shipping the cargo. Suppose, in the first case, that there were a good road and convenient baggage wagons from the place where the stranding was, to the ship which had been procured, lying at a convenient wharf, and that there were great impediments in the way from the place where the goods lay, to the shore; and great difficulties in transporting from the shore in open boats to a ship beating in open and dangerous sea. It would be evident, that there would be a saving of time and expense, and there would be more safety, in the former than in the latter mode of re-shipment.

[1] See *Bryant* v. *Commonwealth Ins. Co.* 13 Pick. 549 *et seq.*; 2 Phillips on Ins 376, 377; *Eagle Bank* v. *Chapin*, 3 Pick. (2nd ed.) 183, note 4; 1 Stark. Ev. (5th Am. ed.) 447 to 462.

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If there were sufficient evidence to satisfy the jury, that the ship was stranded without the fault or fraud of the master, his conduct after the stranding will not admit of a conclusion so favorable. The evidence proves that he did not act in good faith and for the interest of all concerned. After the disaster he seems to have had no object but to raise as much money as he could, and as soon as he could, and for his own use, by a forced sale. He went to Norfolk, where he might have procured another vessel for a reasonable freight, to carry the cargo from thence to Castine. But he made no attempt to do it, and discovered no disposition (as the report finds) to transship or otherwise transport the cargo to its place of destination. If the cargo had been destined for Norfolk, could it be seriously contended that a total loss had happened? And the freight from Norfolk to Castine would have been so small as to make no difference between the two places as ports of destination. It is obvious that no reasonable and honest man would have conducted himself as this master has done. He gave a false account of the situation of the property to his owners, which was received by them three days before the time of sale; when it is evident that he should not only have given them a true account, but also, as he might by postponing the sale for a few days, have given them an opportunity to be present, if they should have thought it expedient, or to furnish pecuniary or other necessary aid, to prevent the enormous sacrifice of their property. It appears that the purchasers cleared from 40 to 70 per cent. in about one month. 145

But the plaintiffs relied much, at the trial, upon a usage to sell property on the beach in similar circumstances; and the jury have found that there was such a usage. We cannot think that such a usage was of any validity. We have seen that it was not uniform. Some cargoes have been carried to Norfolk, and not sold on the beach. It could not have any lawful commencement or continuance, in any case where there was no necessity to make the sale. It was against common faith and honesty. Necessity only will authorize the sale. A usage to sell without necessity would be void.[1] It would be

[1] See 2 Phillips on Ins. 25; *Palmer* v. *Blackburne*, 1 Bingh. 61.

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of no more validity, than would be a usage for the master and people to turn pirates when the vessel should take the ground. So far as it could be proved, that property, situated in all respects as this was, had been disposed of for the benefit of all concerned, on the spot, so far, and no farther, it would be evidence tending to satisfy the jury that the sale was reasonable and necessary. So that it comes to the question, after all, whether or not the master was justified by the circumstances and the necessity of the case, to make the sale as he did.[1] Upon that question we have all a strong opinion, that it was not reasonable or necessary.

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But there was not sufficient evidence to warrant the jury in fixing so great a sum as the expense of transportation. Let us attend to some of the facts which were proved without any doubt. The cargo consisted of coffee in bags, sugar in boxes, and tea in chests. It was landed in a sound condition on the 29th and 30th of December, and sold on the 11th of January following on the beach. The master went immediately after the disaster to Norfolk, and entered the cargo, and made arrangements for selling it, but none for its transportation to the port of destination. It is proved that the purchasers of the cargo carried it by land from the beach to Norfolk *in two days*, in a perfectly sound condition, notwithstanding a storm happened while the carts and wagons were on their way. The property was covered in such manner as that it was not damaged in the least by the storm. The expense of transportation amounted to less than 1600 dollars ; which was nearly twice as much as would have been required in ordinary cases, the carmen taking advantage of an approaching storm, to insist upon an unusual compensation. These facts are proved by the merchants who bought the cargo. It is also proved, that vessels might have been procured at Norfolk for three or four dollars per ton to transport the cargo to Castine. The amount of the transportation thither would probably not have exceeded 2000 dollars, with all the impositions of the carmen. But the

[1] See *Gordon* v. *Mass. F. & M. Ins. Co.* 2 Pick. (2nd ed.) 262, note 1; 267, note 1, and cases there cited; *Hall* v. *Franklin Ins. Co* 9 Pick. 466; 3 Kent's Comm. (3d ed.) 173 to 175; *Gardner* v. *Salvador* 1 Moody & Rob 116 *Bryant* v. *Commonwealth Ins. Co.* 13 Pick. 543.

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cargo remained twelve or thirteen days on the beach in fine weather. In half that time, with ordinary diligence, it might have been carried to Norfolk and laden on board another vessel, and by the time that it was sold upon the beach, it might have been delivered safe and sound at the port of destination, at an expense probably not exceeding one sixth part of the value. The burden is clearly upon those for whom the master was agent under such circumstances, to prove that there was a necessity for breaking up the voyage. But the facts which are 147
proved would not have warranted that conclusion, even if the expense of transporting the cargo to the port of destination had been as great as the jury have stated it. The loss then would have been much less than 50 per cent; which is the general rule applicable to the cargo as well as to the ship.

The loss must fall upon the party whose agent the master became under the circumstances. If there had been a necessity for the sale, the law would have constituted him the agent for the underwriters.[1] As there was not, the loss must fall upon the owners. It is clear from the evidence, that the voyage was worth pursuing, and that the master might, by reasonable care and conduct, have performed it in such manner as that the owners would have sustained only a partial loss. The law will not allow them, under such circumstances, to recover for a total loss.

Some technical objections have been made to the form of the declaration and proof. It is said for the defendants, that the plaintiffs declare in one count for a general average loss which happened at Charleston, and for a total loss afterwards by the perils of the seas, and that such a joinder of separate causes of action cannot be maintained. We do not think that the objection is of validity. The plaintiffs may well declare thus specially upon their whole case, and recover damages according to the proof.

But it is further objected, that by the terms of the policy, the defendants were to have notice of any average loss, sixty days before they should be liable to pay it, and that this action was commenced within sixty days of the notice of the average

[1] See 2 Phillips on Ins. 326 to 328.

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loss. And this objection, so far as it regards the average loss, is a good defence. The defendants might have paid that loss within sixty days, and have prevented any litigation as to that part of the case. No recovery can be had in this action for that loss. But there was a seasonable notice of the stranding at the Washwoods, and a demand sufficient to enable the plaintiffs to recover for the damages occasioned by that disaster.[2]

The verdict of the jury, which was for a total loss, must be set aside and a new trial granted.[3]

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Where a question of boundaries was submitted by the plaintiff and defendants to arbitrators, who awarded that the plaintiff had a title to the land as far as a certain line, and that the defendants, who were in possession, should give him a release of the same, it was *held* to be no objection to the validity of the award, that it did not direct the plaintiff to give the defendants a release of the land on the other side of the line.

Where it manifestly appears by the submission, that the parties intended to leave the whole matter, law and fact, to the decision of the arbitrators, the award is conclusive, although they should have mistaken the law, unless the award itself refers the point to the consideration of the court.

THIS was a bill in equity to compel the specific performance of an award.

The bill sets forth, that on the 4th of April, 1826, the plaintiff claiming to be the proprietor of land in Boston, bounding southwesterly on the ancient mill creek, so called, and also of the soil in the creek in front of his land over to the ancient causeway, lately one of the bounds of the mill pond, and the defendants claiming to own the soil of the creek, they made an agreement in writing under seal, whereby they submitted to the award of Lemuel Shaw, Samuel Hoar, jun. and William Sturgis, all matters in controversy in the premises, and that the arbitrators should award the limits and boundaries

[2] See 2 Phillips on Ins. 382, 383.

[3] See *Bryant* v. *Commonwealth Ins. Co.* 13 Pick. 543.

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between their estates, and cause a plan to be made, if they should see fit, in conformity to their award, to make such boundaries certain, and the parties mutually covenanted to abide by the award and to execute any deeds of release necessary and proper to give effect to the same ; that on the 8th of June following, the arbitrators heard the parties, and fully considered their respective allegations, proofs and arguments upon the whole matters submitted, and thereupon awarded that the plaintiff has a good right and lawful title to the land, formerly flats, in front of a wharf conveyed to him in 1814, and that his land extends southwesterly between two certain lines to a line forming the base of the old mill dam on the outward or northeasterly side thereof, according to a plan annexed to the award ; that they further awarded, that the defendants should within thirty days after the publication of the award, make, execute and deliver to the plaintiff, his heirs and assigns, a quitclaim deed to every part of the premises so awarded to him ; that on the same 8th of June the arbitrators duly published their award ; yet the defendants, though specially requested after the expiration of the thirty days, never executed and delivered to the plaintiff a quitclaim deed : — and the prayer of the bill is, that the defendants may be compelled to execute and deliver such a deed.

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The defendants, in their answer, say, that although in the preamble to the agreement between the parties, set forth in the bill, it is recited that the plaintiff claimed to be owner of the soil in the creek in front of his land over to the ancient causeway, yet they deny that at any time prior to the award, they had any reason to suppose that he seriously pretended or meant to claim the soil in the creek between his land and the causeway, except the part lying eastwardly of a channel running through the creek, contiguous to his land ; that they thought he always admitted their title to the land on the west side of the channel, and that they were confirmed therein by letters from him, and that they considered that the only controversy between the parties related to damages for obstructing the water-course, and the right to the soil east of the channel ; that the words, " over to the ancient causeway," in the

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recital, were intended by them as descriptive of the creek, and not of the boundaries of the land claimed by the plaintiff.

They further say, that the claim of the plaintiff, so far as it was supported on the ground of the law which gives to the proprietors of upland the property in contiguous flats, and of extending the low-water mark beyond the channel above mentioned, was new to their counsel and unknown and unexpected by themselves, and that had they known of such claim, they could have found and produced before the arbitrators conclusive evidence to rebut it.

Further, that, as they are informed, the arbitrators adopted it as a principle and foundation of their award, that by the
150 discontinuance of the use of the creek as a highway, (the soil thereof being vested in the owner of the contiguous upland,) the plaintiff became entitled to the land awarded to him, in virtue of the law by which the upland carries the flats, when even on this principle a part of the land awarded to him would belong to the defendants as proprietors of land adjacent to the plaintiff's.

They admit that the award would be binding as to the land east of the channel, if that had been ascertained by the award; but in regard to land west of the channel they were taken by surprise, and their counsel were obliged to proceed without sufficient instructions or evidence, and induced to treat as a subordinate question, what was regarded by the arbitrators as a principal question.

They say that the arbitrators mistook the law in awarding to the plaintiff all the flats west of the upland, so as to make the same commensurate with the external lines of his upland, when in fact a proportion only of such flats could have reverted to him by the discontinuance of the use of the creek as a highway.

They also deny that the award is mutual and comformable to the agreement. They say that the claim of the plaintiff, according to his construction of the agreement, extended to the ancient causeway, but the land awarded extends only to the base of the causeway, between which and the causeway itself is a space of eighteen feet, which was comprehended in the plaintiff's claim, but which, as may be inferred from

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one award, was regarded by the arbitrators as the property of the defendants; and, therefore, when the arbitrators awarded that the defendants should release to the plaintiff their claim to the soil of the creek as far west as the line forming the base of the old causeway, they ought also to have awarded that he should release to them his claim to the land (comprehended in the terms of the agreement) westward of the base line.

The plaintiff filed a general replication.

The depositions of Mr. Shaw and Mr. Sturgis were in the case. Mr. Shaw stated, that it was a subject of discussion before the referees, whether the plaintiff had a right to the flats lying in front of the upland claimed by him, and what was the extent of that right; and as the causeway, or a part 151
of it, lay in front of the estate, and far within the distance of 100 rods, the discussion embraced the question, whether he had a right to the flats up to the causeway. He claimed them to that extent, and the claim was resisted by the defendants. Much evidence was given on both sides, and the defendants were fully heard on the subject, as well in regard to the law as the facts, and they did not express a wish for further time to be heard upon any question discussed. The hearing occupied three days. The referees adopted as a principle, that the plaintiff, in virtue of his being owner of the upland in question, and by force of the colony law of 1641, or of the ancient rules and usages of the Commonwealth which probably originated in that law, and which they considered to be adopted as rules of law, was entitled to the flats in front of his estate over which the sea ebbed and flowed, as appurtenant to the upland, although there was no channel in that direction, or line which might be denominated or considered as the line of low-water mark. The witness was of opinion, upon the whole case as then presented, that the plaintiff was entitled to the flats awarded him, as appurtenant to his wharf and upland, upon the ground before mentioned. The testimony of Mr. Sturgis was in accordance with that of Mr. Shaw.

J. Pickering and *Minot*, for the defendants. The decisions *March* 10th.
in England, that where the objections to an award do not appear on the face of it, the court cannot go behind it, have been influenced by the statute of 9 and 10 *Will.* 3, *c.* 15, (which

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has not been adopted here,) and do not rest solely upon the common law. The result of the more recent cases seems to be, that where there has been a mistake of the arbitrators, in matter either of law or of fact, and whether appearing on the face of the award or by extrinsic evidence, the court, in the exercise of a sound discretion, will give relief, if injustice has been done. *Kent* v. *Elstob*, 3 East, 18; *Ainslie* v. *Goff*, Kyd on Awards, 351; *Aubert* v. *Maze*, 2 Bos. & Pul. 375; *Nichols* v. *Chalie*, 14 Ves. 271; *Morgan* v. *Mather*, 2 Ves. jun. 18; *Seymour* v. *Seymour*, 4 Johns. Ch. R. 405; *Chace* 152 v. *Westmore*, 13 East, 358; Tidd's Pr. 763; *Williams* v. *Craig*, 1 Dallas, 315. Then is there sufficient ground for the Court to interpose in the present instance? It appears that the arbitrators adopted the rule stated in the defendants' answer and in the testimony of the arbitrators, namely, that the flats in front of the plaintiff's upland, on the west side of the creek, belonged to him by virtue of the colony ordinance of 1641, notwithstanding there was no low-water mark in that direction; and in this it is apprehended they mistook the law.

Another objection to the award arises from the want of mutuality. As the plaintiff's claim to a part of the land in controversy was disallowed, the arbitrators should have directed mutual releases.

Sullivan and *Nichols*, *contrà*. It is not competent for the defendants to take advantage of a mistake made by the arbitrators in matter of law, unless the mistake appears on the face of the award. This was a submission to settle boundaries, presenting a complicated question of law and fact, and if the arbitrators have mistaken in a doubtful point of law, as they were judges of the parties' own choosing, the Court will not set aside their award. No suggestion has been made that they exceeded their powers, or that they were guilty of any misconduct. *Ridout* v. *Pain*, 3 Atk. 494; *Jackson* v. *Ambler*, 14 Johns. R. 105; *Herrick* v. *Blair*, 1 Johns. Ch. R. 102; *Morris* v. *Ross*, 2 Hen. & Munf. 408, 413; *Perkins* v. *Wing*, 10 Johns. R. 143; *Ching* v. *Ching*. 6 Ves. 282; *Steff* v. *Andrews*, 2 Mad. R. 6; *Wood* v. *Griffith*, 1 Swanst. 55; *Kleine* v. *Catara*, 2 Gallison, 69; *Goodman* v. *Sayers*, 2 Jac. & Walk. 255; *Taylor's Adm'r.* v. *Nicholson*, 1 Hen

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& Munf. 69; *Morgan* v. *Mather*, 2 Ves. jun. 15; *Dick* v. *Milligan*, ibid. 24.

As to the want of mutuality, we say that the arbitrators have awarded to the plaintiff all the land which he claimed, and so a release from him was not necessary; but supposing that they have not, the plaintiff, by taking a release describing his land as bounding on that of the defendants, will be estopped to claim any further, and so the award is mutual. It is not essential that the mutuality should appear on the face of the award. Caldwell on Arbitr. 113; Kyd on Awards, 218 to 228, and 259 to 261.

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March 29th.

Parker C. J. delivered the opinion of the Court. On a former hearing of this case on demurrer to the bill, founded on a supposed want of jurisdiction in the Court or power to decree specific execution of the award, the demurrer was overruled, and the defendants were ordered to make answer to the bill. [See 4 Pick. 507.] An answer having been filed, to which there have been no exceptions, the case has been argued upon the general question, whether any thing contained in the answer is sufficient to show that the award is bad in law, or whether on any grounds of equity the defendants ought to be relieved from its effects.

It has been urged, that the award is bad in itself, in not being mutual, that is, in not providing that a release should be given by the plaintiff to the defendants, of land supposed to be contained in the description of land claimed by the plaintiff, but not confirmed to him by the award; a release being required from the defendants of all the residue of the land within his claim. We do not find it essential to the validity of an award, that releases should be required on both sides, if the title is so ascertained by the award itself, as to leave no room for disputation. By the submission, authority was given to the arbitrators to require such deeds of release as should be necessary and proper to give effect to the award. The arbitrators awarded a release from the defendants to the plaintiff, of the land which they determined the plaintiff ought to hold, and this was proper, as the defendants were in possession claiming title; and though, without a release, the award would have been conclusive between the parties as to the extent of their

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several claims, it was more convenient that the claims and possession of the defendants should be extinguished by a deed of release, which of course, when duly executed and delivered, would admit of no dispute. Perhaps it would have been better to require a release from the plaintiff to the defendants, of all lands without the bounds ascertained by the award; but as the defendants were already in possession, claiming the land under their general title as proprietors of the mill pond, a release was by no means essential to them. The award itself
154 settles the limits of the plaintiff's claim, and there was no possession or claim of right on his part beyond the boundary established by the award; so that there is no want of mutuality in any thing in the least degree important to the parties. And it may be added, that if a release from the plaintiff to the defendants were necessary, to carry into effect the award, as he has covenanted to make and execute any deed of release which may be necessary for that purpose, he might be compelled by a bill to perform that covenant. But a release was not necessary to either party, for it is clear that the award itself would establish the title.[1] In *Shepherd* v. *Ryers*, 15 Johns. R. 497, it was held, that an award of land to one party estops the other from setting up title to the land awarded; and in *Sellick et al.* v. *Addams*, *p.* 197 of same volume, it was held, that when an award settles the boundary of land, the party to whom it is awarded may maintain ejectment, or justify in trespass brought by the other party.

Another objection to the award is, that the arbitrators proceeded upon a mistaken construction of the right of the plaintiff to flats as appurtenant to his upland under the colonial ordinance of 1641, and that for this cause the defendants ought to be relieved from a specific execution.

It is answered, on the part of the plaintiff, that an award will not be set aside, or its execution superseded, on account

[1] See *Carey* v. *Wilcox*, 6 N. Hampsh. R. 179, 180, and cases there cited; *Byers* v. *Van Deusen*, 5 Wendell, 268; *Gould* v. *James*, 6 Cowen, 369; *Jackson* v. *Gager*, 5 Cowen, 383; *Cox* v. *Jagger*, 2 Cowen, 638; *Sellick* v. *Adams*, 15 Johns. R. (2nd ed.) 200, note *a*; *Robertson* v. *M'Niel*, 12 Wendell, 578; *Davis* v. *Havard*, 15 Serg. & Rawle, 166; *Shackleford* v. *Purket*, 2 Marshall, (Ken.) 439; *Page* v. *Foster*, 7 N. Hampsh. R. 395

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of any supposed mistake of the arbitrators in matter of law, unless it appears by the award itself that it is defective in the point suggested.

There seems to be considerable contrariety of opinion in courts of law and equity upon this subject, and it is not easy to reconcile the opinions and reasonings of different judges thereon.

It was formerly held, that awards should not be set aside on account of any erroneous opinion in matter of law, unless the error appeared on the face of the award. But in *Kent* v. *Elstob*, 3 East, 18, there is a decision which greatly relaxes this rule. The arbitrator stated his reasons and delivered them on a separate paper to the parties. It was obvious that he meant to decide according to law, and was mistaken. The award was set aside on a rule, because the law was mistaken. 155
Lawrence J. says it is not necessary that the arbitrator's reasons should appear on the face of the award, in order to enable the court to examine them. The reasons appearing on a separate paper were considered to be before the court, as much as if they had appeared on the award itself.

But in the case of *Chase* v. *Westmore*, 13 East, 357, very different ground is taken by Lord *Ellenborough*. The case, involving a question of law, was referred to a gentleman of the bar. There was a motion to set aside the award because he mistook the law. The question of law was raised in the pleadings, but did not appear on the face of the award, though it was brought before the court by affidavit. The chief justice said he "feared it was impossible to lay down any general and certain rule. It is enough to say, that in the present case, where the merits in law and in fact were referred to a person competent to decide upon both, we will not open the award, unless it could be shown to be so notoriously against justice and his duty as an arbitrator, that we could infer misconduct on his part." The other justices agreed, and *Le Blanc* J. said, when the question of law necessarily arises on the face of the award, then the court must take notice of it.

Now these two cases in the same court are quite contradictory, so that it will not be safe to take either of them for a guide.

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By the decisions in chancery, it would seem to be considered as discretionary to set aside an award or not, on matter of law, according to what shall be deemed to be on the whole the justice of the case. Thus, if the arbitrators appear to be mistaken in a doubtful matter of law, the award may be permitted to stand, though the court after great deliberation should be of a different opinion from the arbitrator. Kyd on Awards, 351.

But the general rule in chancery seems to be, that awards may be set aside for matter in law, and it does not appear that it is necessary the error should appear on the award itself; at least that is not stated to be requisite.

Thus in a note to the case in 14 Ves. 271, it is stated,
156 that under a general reference, the mistake of the arbitrator, meaning to decide according to law, will be corrected ; but if parties refer a question of law to an arbitrator, meaning to have his decision, the court will not interfere. So in 9 Ves. 364. If they refer to a person to decide all matters in difference according to law, and the arbitrator means to decide according to law, and mistakes, the court will set this right. But if a distinct question of law, and nothing else, is referred, and the parties choose to say they will not take the decision of the court, but will take whatever an arbitrator shall say is the law, why may they not so agree ?

It is pretty clear then, that there is no definite rule on the subject in the English books, and yet there ought to be, and must be, some principle by which questions of this kind are to be settled. We take one principle to be very clear, which is, that where it manifestly appears by the submission, that the parties intended to leave the whole matter, law and fact, to the decision of arbitrators or referees, the award is conclusive, although they should have mistaken the law, unless the award itself refers such question to the consideration of the Court. And this is enough to settle the case before us ; for by the agreement to submit to arbitrators, all matters of law are expressly referred to the arbitrators in these words : — " It is agreed that the parties hereto may introduce any legal evidence in support of their respective rights and claims, and that the legal construction thereof is submitted to said referees." It is

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not objected that any evidence not legal was admitted, and that is the only limitation to the authority of the arbitrators. They have given their construction upon all the evidence, and the parties cannot retract their agreement upon the allegation of a mistake. They selected a tribunal in all respects competent to decide a complicated case of law and facts; and if their opinion on the matter in law should not be adopted by the court, their judgment is nevertheless to stand. The law on the point on which it is said they were mistaken, was, to say the least, very doubtful; and upon that ground the award ought to stand, according to the doctrine cited from Kyd; and their opinion is so far from being notoriously wrong, that 157
it is highly probable one half of the profession would have given the same opinion, and so, according to Lord *Ellenborough*, in the case in 13 East, this forms no ground for setting aside the award. [1]

Another ground for resisting the decree, as set forth in the answer, is the alleged surprise of the defendants and their counsel, as to the importance attached to one of the subjects of discussion, so that they were not prepared to argue it as a principal matter in dispute. But we cannot listen to this complaint. A full and patient hearing was given; the point referred to was raised and urged by the defendants' counsel; if they were surprised, they should have applied for time. There was nothing urged which was beyond the subject matter of the arbitration. The claim of the plaintiff, as heard and decided upon by the referees, was according to his description in the submission; for it extended over to the causeway. The defendants should not have been surprised at the attempt to enforce this claim to its extent; and there is no extrinsic evidence from which we can perceive any intention to diminish his claim.

Specific performance decreed. [2]

[1] See 2 Story's Comm. Eq. 676 to 679; *Walker* v. *Sanborn*, 8 Greenl. 288; *Smith* v. *Thorndike*, 8 Greenl. 119; *Bigelow* v. *Newell*, 10 Pick. 355, 356.

[2] See 2 Story's Comm. Eq. 680 to 681.

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JACOB P. RUST *versus* BOSTON MILL CORPORATION.

An ancient book of records of the town of Boston, entitled the Book of Possessions which, although not regularly authenticated, has been preserved among the records of the town, was held (there being nothing to impeach its verity) competent and sufficient evidence to establish the ancient titles under allotments from the town.

The owner of land bordering on a cove where the sea ebbs and flows, who is entitled, under the colony ordinance of 1641, to the adjoining flats "to the low-water mark," cannot always claim the flats in the direction of the exterior lines of his upland, but only in the direction towards low-water mark from the two corners of his upland at high-water mark.

Thus in the case of a circular cove in which there is no natural channel, if a straight line across the mouth of the cove is 100 rods in length and the circular line of high-water mark is 200, each owner of a lot abutting on the cove is entitled to run his lines from the two corners of his lot in a direction towards low-water mark, so as to include a parcel of flats, which at the mouth of the cove will be one half the width of the lot at high-water mark; and thus each will hold his share in severalty.

In the case of an ancient grant of "all that cove, *already bounded*," &c. it was held, that in the absence of all proof of ancient bounds supposed to be referred to, the grant must operate according to the general description of the estate granted.

In a writ of entry, upon the question whether the grantees of a cove, under whom the tenants derived their title, had ever claimed or taken possession of flats outside of a certain line, the tenants were permitted to give in evidence an ancient deed under which possession had been taken and continued to the present time, from such grantees to a third person, of a part of the flats so situated.

WRIT of entry, demanding possession of certain land, formerly flats in the mill pond cove, in Boston. Plea, *nul disseisin*. Trial before *Parker* C. J.

The demandant, to trace his title prior to the year 1643, produced an ancient book of records of the town of Boston, entitled the Book of Possessions, which he contended was made pursuant to an ordinance of the colony in 1634. This book was in the case for the consideration of the whole Court. The causey therein referred to, was admitted to be the ancient way leading from Cross street towards Charlestown, in the direction of Snow Hill street, this way having long since been covered by the mill pond.

The possessions relied on as embracing the estate in suit, were Thomas Buttolph's, William Copp's and John Button's

159 The allotment to Buttolph, the demandant contended, was between Snow Hill street and the North Mills, bounding on

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the marsh afterwards covered by the pond. He contended that these possessions embraced all the upland from Snow Hill street round as far at least as Charles River bridge; and that those of Copp and Button, bounding northwesterly and northerly on Charles river, included the flats in front of them, under and by virtue of the colony law of 1641.

The demandant did not deduce a connected title to himself from Copp, Button or Buttolph; but he contended that these persons, or some one of them, being the owners of the estate in question before 1643, it would be sufficient for him to show that he, and those under whom he claims, had been in possession of the estate for such a length of time as to raise a presumption that they had acquired a title by grant from the former owners; and that at any rate this was sufficient to rebut any claim of the tenants under a supposed grant of the town in 1643, the town having at that time no right to grant the same. He then attempted to show, that he, and those under whom he claims, had been in possession of the estate, claiming title thereto, for more than 120 years. For that purpose he read in evidence various deeds and depositions; and likewise exhibited a plan of the town of Boston, made in 1722, in which the ship-yard of Joshua Gee (through whom the demandant claims) corresponds with the present upland of the demandant. In conveyances since 1750, of different parcels of the land which belonged to Gee, they are described as bounded "by the sea or salt water with the flats," — "on the mill stream," — "on the mill cove or salt water," — "on mill creek or flats, so called."

There was much evidence on both sides in respect to the occupation by the parties, of the flats in question.

On the part of the tenants it was proved, that the town of Boston, on the 31st of 5th month, 1643, made to Henry Simonds and others, a grant of all that cove, *already bounded*, on the northwest side of the causey leading towards Charlestown, with all the salt marsh bordering thereupon round about, not formerly granted to any others, on certain terms and conditions; which grant was in the case. On the 27th of 9th month, 1643, at a meeting of the selectmen, the intent of the agreement between the town and the grantees of the cove, &c

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for the mill, was declared; and this declaration was in the case.

It was admitted, that the tenants have now whatever estate was conveyed by the grant to Simonds and others, except such parts thereof as the grantees or their assigns have since transferred to other persons, unless they have lost the same by forfeiture or otherwise.

A copy of a deed from the mill proprietors in 1735 to Waldo and Cook was offered in evidence by the tenants, showing that at that time the mill proprietors claimed the flats outside of the mill dam. This, however, was objected to by the demandant, as not legal evidence, but was admitted by the judge. It was conceded that the grantees entered and took possession, and that the land and flats conveyed are now held under the deed.

The tenants then gave in evidence the indenture between the town of Boston and themselves, in 1807, in which the original grant to Simonds and others is referred to as embracing the flats on both sides of the dam, and the town release to the tenants all the conditions contained in that grant, and all the right and interest of the town in the mill pond, and in the flats on the outside of the dam, to the same properly belonging.

The course of the ancient causeway mentioned in the grant to Simonds and others, was delineated on the plans used on the trial, and also the course of the old mill dam. This dam the demandant contended should be considered as a boundary, fixed by the grantees at the time of the grant or very soon afterward, showing what they then understood to be the extent of their grant. The plan of the town in 1722 was also exhibited by the demandant, as showing certain projections from the shore, near the ends of the dam, and which were, as he contended, the "spits" referred to in the explanatory grant above mentioned.

It appeared from the plans used in the case, and also from
161 the testimony of the surveyors, that the line of low-water mark was a considerable distance northerly, outside of the flats claimed in this suit, and nearly parallel therewith. But the flats claimed are within the exterior lines of the demand

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ant's upland continued westerly. And he contended that he had a right by law to all the flats in front of his upland, to such a distance outward as not to interfere with the rights of those on the opposite shore, and not to obstruct the passage of the owners of land within the cove to the main channel, and that all the proprietors round the cove, instead of going in the nearest direction to low-water mark, should go towards a common centre, leaving a sufficient space for a common passage to low-water mark.

The number of feet round the shore of the cove, as claimed by the tenants and as the shore now exists, and the number of feet across, was ascertained. Also the length of the demandant's line of upland, and the number of feet occupied by him on the line of low-water mark. It appeared, that if the whole flats were apportioned among the different proprietors, so as to give to each such a number of feet on the line of low-water mark, as would belong to him according to the length of his line of upland, the demandant had already more than his share.

Upon the facts in the case, the judge charged the jury, that it was not proved by the demandant, that the upland now owned by him was granted to Copp and others before 1643, or that the land so granted had come to the demandant derivatively from the original grantees, yet that both these points were matters to be judged of by the jury; the first from the Book of Possessions itself, and the second from the presumption of grants which had been lost. But he further instructed them, that it was immaterial whether they were satisfied upon these points or not, inasmuch as he was of opinion, that the demandant could not recover the flats claimed by him as appurtenant to his upland, under the colony ordinance of 1641, because they did not lie in the direction from the upland towards low-water mark; and that where the upland was so situated that the owner could not claim them in that direction, he would have no right to any flats under that ordinance; that whether the abutters round a circular cove would take the flats within the cove as tenants in common, in proportion to the extent of their upland, or whether each man would take in severalty such just proportion as might belong to him, was of no importance in this action, for the demandant could not re-

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cover as tenant in common, his proportion not being ascertained, nor any attempt made to show what his proportion was, nor any claim made by him as tenant in common; and if he owned in severalty a certain portion, he had got already more than his share.

The judge further instructed the jury, that in his opinion, the grant to Simonds and others embraced such a length of time as to have given them a title; that in respect to the demandant, he having proved that Paine and Adams, under whom he claims, had been in the possession of a wharf, and of the flats necessary for the enjoyment of it, for more than forty years, he was now entitled to the flats to that extent, but no further. The jury were accordingly directed to ascertain the outward line of the wharf, and to allow the demandant as great a distance outside of that line, as would be sufficient to accommodate such vessels as usually came to the wharf, allowing room enough for two vessels to lie abreast, or at farthest for one to turn round. The jury fixed the boundary line accordingly, and found that the tenants had disseised the demandant of all the demanded premises within that line, and had not disseised him of the residue.

The demandant moved for a new trial for the following reasons: —

1. Because the judge instructed the jury, that it was immaterial for them to consider whether the demandant had or had not proved, that certain persons under whom he claims, were seised of the flats appurtenant to his upland, before the year 1643, because he was of opinion, that if the demandant was entitled to any flats by virtue of the colony ordinance of 1641, he was not entitled to claim them in the direction of the exterior lines of his upland, but only in the direction to low-water mark.

2. Because he omitted to instruct the jury, that the demandant having shown that he and those under whom he
163 claims, had been seised of the upland, from the North Mills to Charlestown ferry-way, for more than a hundred years, and had been in the constant and uninterrupted use of the flats adjacent, for the accommodation of shipping and other marine purposes, the demandant had acquired a title by prescription,

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and by the laws and usages of this Commonwealth, to all the flats lying before his upland and within the exterior bounds thereof, continued so far out as any one by law had a right to go; and that therefore the town of Boston, even if they once owned these flats, had lost their right to the same long before the year 1807, and had no right to grant them at that time; and that whatever rights the mill owners might have had to the same under the grant in 1643, they also had long since lost the same, and by voluntarily abandoning their mill privileges, abandoned also any easement they might have had over the flats outside of the dam, for the influx and efflux of water into and out of their mill pond; leaving the flats as the property of the owners of the adjoining upland, unincumbered of any such easement. [The judge was not requested to charge the jury upon this or any other point.]

3. Because the judge instructed the jury, that by the terms of the grant to Simonds and others in 1643, "of all that cove on the northwest side of the causey leading to Charlestown," the grantees were entitled to all the flats included within a line drawn from the extreme projections at Barton's Point (on the westerly side of the cove) and the outer part of what was formerly Gee's ship-yard; and that the terms "already bounded," did not limit the grant to the land and flats within the mill dam.

4. Because he instructed the jury, that the particular location of the mill dam, at the time of, or soon after the grant, could not be considered as amounting to a contemporaneous construction of the extent of the grant.

5. Because the judge admitted the deed from the mill proprietors to Waldo and Cook in 1735, to be read in evidence to the jury, to show their construction of the terms of their grant, though the subject matter of that deed related to flats at the extreme westerly end of the mill dam, and did not affect 164
the estate claimed by the demandant, and no other instance of such construction was proved till the release by the town of Boston in 1807.

6. Because the judge instructed the jury, that if the flats outside the mill dam, of which the demanded premises make a part, were not included in the grant to Simonds and others in

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1643, they must still be considered as the property of the town, till they released the same to the tenants in 1807, excepting such part as would, in the opinion of the jury, be considered as appurtenant to the ancient wharf of Paine and Adams for the use of shipping.

7. Because the verdict was against evidence, inasmuch as the bounds of the flats claimed by the tenants themselves, extended no further eastward than the mill stream, but the bounds, as fixed by the Court, gave the tenants a considerable extent of flats eastward of the mill stream.

March 12th. *Sullivan* and *Nichols*, for the demandant. The colony law of 1641 (Anc. Charters, 148) provides, that, in all coves &c. where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." The object of this is to fix the rights of the public, as opposed to those of the owners of the upland; it does not ascertain the rights of such owners as between themselves. The legislature intend, that the owners of the upland, as a body, shall hold to low-water mark, &c. By the common law of this State, a person owning land on a cove may wharf out in front of his land; and this ordinance will bear that construction. It does not say that such owner shall go to low-water mark in the nearest or any particular direction. There may be many points of low-water mark equally near to his upland. The abutters must own the cove according to the rules of the common law respecting fresh water coves, or they must go to a common passage way, so that each one may be accommodated. In the case of a triangular cove it may be right to go out towards low-water mark; but in those of a different shape it would be impracticable. Suppose a cove to be in the form of the letter U; according to
165 the principle laid down at the trial, the proprietor of the up land at the bend would own all the flats. It would be improper to go obliquely to low-water mark, for then the owners would cross each other, which would produce confusion. Suppose there is an island in the cove; must the owner of that part of it, which fronts on the channel, have flats, and the owners of the rest have none? The ordinance relates to the

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owners of the upland all round the cove, and it intends that the exterior lines of their flats shall be at right angles with the line of their upland. One object of the ordinance was to enable them to wharf out in front of their respective lots; but according to the construction given at the trial, those near the mouth of the cove would be debarred this privilege. *Commonwealth* v. *Charlestown*, 1 Pick. 183; *Storer* v. *Freeman*, 6 Mass. R. 438. They would have a right by the common law to embank in front of their upland. Angell on Tide Waters, 150.

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On the point, that Simonds and others, by building the mill dam, had given a practical construction of the extent of the grant made to them by the town, the counsel cited *Jackson* v *Schoonmaker*, 7 Johns. R. 12; *Jackson* v. *Murray*, ibid. 10; — and as to the inadmissibility of the deed to Waldo and Cook, *Outram* v. *Morewood*, 5 T. R. 121; *Jackson* v. *Bard*, 4 Johns. R. 234.

H. G. Otis and *Minot*, for the tenants.

WILDE J. delivered the opinion of the Court. The lands demanded in this action were formerly flats, and the demandant claims them as appertaining to his adjoining upland, by virtue of the colony law of 1641. To establish his title, he proved at the trial, that soon after the first settlement of the country certain allotments were made to Thomas Buttolph, William Copp, and John Button, which included the upland now in the possession of the demandant. *March 29th*

These allotments were proved by an ancient book of records of the town of Boston, entitled the Book of Possessions, which, although not regularly authenticated, has been preserved among the records of the town, and as nothing appears to impeach its verity, we consider it as competent evidence, and as sufficient to establish these ancient titles.[1]

The demandant did not deduce a connected title from Copp and others. Yet as it was proved that he and those under whom he claims, had been in the possession of a part of the upland included in the ancient allotments above mentioned, claiming title thereto, ever since the year 1653, we are 166

[1] See 1 Stark. Ev. (5th Am. ed.) 200 *et seq.*; 2 Harr. Dig. 1074, 1075

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of opinion that such a long and undisturbed possession is sufficient to raise a presumption of a grant from the former owners. [1]

But no flats were included in these allotments, which were bounded, on the side of the cove, by the marsh; so that all the flats, on this side, were necessarily excluded; and cannot be now claimed as appurtenant to the upland, unless the allotments were made, as the demandant contends they were, previously to the ordinance of 1641. This question of fact has been submitted to the consideration of the jury, and the verdict would be conclusive, if the chief justice had not intimated to the jury that it was not material; but as they might have been prevented from considering the matter by this intimation, there ought to be a new trial, provided the fact is material and was sufficiently proved by the evidence.

To prove the fact, the demandant, at the trial, relied on the Book of Possessions; but there is nothing to be found in this book to fix the dates of the grants to Copp and others, or to show when their possessions commenced. But the presumption is strong, that they did not commence so early as to entitle them to the flats under the ordinance of 1641. In 1643, the town granted all the cove and all the salt marsh bordering thereupon round about, not formerly granted to any others, to Henry Simonds and others, under whom the tenants claim. The exception of former grants referred, no doubt, to grants made by the town.

It appears by the records of the town, that governor Winthrop and several distinguished citizens were present at the meeting when this grant was made. And it cannot be presumed that they were ignorant of the legal rights of the town; or that they would have consented to the grant, unless they were satisfied as to the title. Nor can it be presumed that the grantees
167 would have made the purchase, thereby engaging to incur the heavy expense of erecting mills, according to the terms and condition of the grant, without a thorough examination of the title of the grantors.

We find also, that soon after the grant, several proprietors

[1] See *Farrar* v. *Merrill*, 1 Greenl. 17; *Jackson* v. *Moore*, 6 Cowen, 706 *Jackson* v. *Dieffendorf*, 3 Johns. R. 269.

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of upland bordering on the flats applied to the town for leave to wharf out before their lands. And among those thus applying, Thomas Broughton, under whom the demandant claims, was one, who applied for this purpose in 1652 and renewed his application in 1654. These facts raise very strong presumptions in favor of the ancient title of the town; and we find no evidence in the case to repel them. We are therefore all of opinion, that there was no evidence at the trial which could have warranted a verdict on this point in favor of the demandant. But if the allotments to Copp and others had been made previous to the ordinance of 1641, it is by no means clear that they could have claimed the flats by virtue of that ordinance; because there is marsh land in front of these allotments. This appears by the Book of Possessions; and that there was marsh thereabout, appears also by the grant to Simonds and others, and by the explanation of that grant, in which it is declared that the grantees shall not be bound to reserve any marsh, if they should have occasion to cut it up, but in that case the town's liberty for repairing the causeway was to reach to such land as might be left, whether upper or nether spitt. If then there was marsh in front of the allotments to Copp and others, which was excluded by the terms of those allotments, they could not take the flats under the ordinance; for the flats would belong to the proprietor of the adjoining land, whether upland or marsh.

This being our view of this part of the case, it is immaterial whether the construction given by the chief justice to the ordinance of 1641 was correct or not. For if the demandant has shown no title under the ordinance, the construction of it is unimportant. We however have no doubt of the correctness of the construction adopted at the trial. If the demandant were entitled to the flats, he could claim them only in the direction to low-water mark. This is the obvious meaning of the language of the ordinance. And it appears to me that the supposed difficulty of making a division of the cove among the several proprietors of the land adjoining, is without foundation. Let us suppose that a line drawn across the mouth of the cove were 100 rods in length; and that the circular line of the cove at high-water mark were 200 rods in

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length. Then each proprietor of a lot abutting on the cove would be entitled to run his lines from the two corners of his lot in a direction to low-water mark, so as to include a piece of flats which would be at the mouth of the cove one half of the width of the lot at high-water mark; and thus by converging lines the whole cove might be divided without any intersecting lines.

Thus if there were only two proprietors of the land surrounding the cove, each holding a moiety in severalty, and their dividing line being at the centre of the head of the cove; then a central line passing down to low-water mark would be the dividing line of the flats between the two proprietors. So if there were four proprietors, each owning an equal extent of front on the cove, then each would be entitled to a piece of flats 25 rods in width at the mouth of the cove, so that lines drawn from the corners of each lot at the front, in a direction to low-water mark, and being distant from each other at the mouth of the cove 25 rods, would give to each proprietor his due share of the flats in the cove, according to the terms of the ordinance of 1641. And this form of division will be practicable whatever may be the number of lots around the cove. Thus each proprietor may hold his share of the flats in severalty, subject to no other restrictions than those imposed by the ordinance, namely, that he shall not obstruct other proprietors in the enjoyment of their water privileges, by hindering the passage of boats, vessels, &c. In thus dividing flats in a cove or creek, we suppose that there is no natural channel within the cove, and that low-water mark is without the same. These facts seem to be satisfactorily proved in this case, for although it was attempted to be shown that there was a natural channel in the cove, yet the weight of the evidence is clearly opposed to such a supposition.

169 I am aware that coves and creeks may be so irregularly formed as to render this or any other mode of dividing the flats according to the ordinance difficult, if not impracticable; but it is sufficient for the present, that such is not the form of the cove in question.[1]

[1] The mode adopted in Maine for ascertaining the side lines of water lots from the upland to low-water mark, under the colonial ordinance of 1641

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The demandant, therefore, has wholly failed to establish his ancient and original title to the flats in question. In the first place, there is no sufficient evidence of the grant or allotment of the upland to Copp and others previous to the ordinance of 1641. In the second place, this allotment was bounded on the westerly side by marsh, which separated it from the flats, so that if it had been made previous to 1641, the flats would nevertheless belong to the proprietors of the marsh. And thirdly, if the demandant were entitled to the flats under the ordinance, he could not claim them in the direction of the exterior lines of his lot.

The next question to be considered is, whether the demandant's title by possession is sufficient to maintain his action. It appears that he and those under whom he claims have been in possession of the upland bordering on the cove, for more than a century. And in tracing his title, it also appears that flats have been claimed and conveyed as appurtenant to his lot; and that he and those under whom he claims have entered on a part of the flats, have built a wharf thereon, and have used the flats adjacent for the accommodation of shipping and other purposes, during the whole or a greater part of that period.[2] Now the demandant's counsel contend, that by this entry and possession of a part of the flats, he and those under whom he claims became seised of the whole flats in front of his lot, according to his present claim. This may be true in regard to strangers or those not having a prior title; it becomes necessary, therefore, to examine the title of the tenants, and to compare it with this possessory title on the part of the demandant.

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where they have not been otherwise settled by the parties, is, to draw a base line from one corner of each lot to the other, at the margin of the upland, and run a line from each of these corners, at right angles with such base line, to low-water mark. If the line of the shore is straight, the side lines of the lots, thus drawn to low-water mark, will be identical; but if by reason of the curvature of the shore, they either diverge from, or conflict with, each other, the land enclosed by both lines, or excluded, as the case may be, is to be equally divided between the adjoining proprietors. *Emerson* v. *Taylor*, 9 Greenl. R. 42. A plan is introduced into the above decision, by which the mode of division in such cases is illustrated. See *Deerfield* v. *Arms*, 17 Pick. 41.

[2] See *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick (2nd ed.) 135, note 3

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It has been already remarked, that a grant of the cove was made by the town of Boston to Simonds and others in the year 1643, and it was admitted at the trial, that the tenants have all the estate conveyed by that grant. The words of the grant are as follows: — "There is granted unto Henry Simonds, George Burden, John Button, John Hill, and their partners, all that cove (already bounded) on the northwest side of the causey leading from Charlestown, with all the salt marsh bordering thereupon round about, not formerly granted to any other; reserving liberty from time to time to make use of any part thereof for repairing the said causey; to have and to enjoy the said cove and marsh to them and their heirs and assigns for ever." By this grant the whole cove and marsh passed to the grantees in fee, unless the general words are restricted by the words "already bounded." When general words of description are made use of in a grant, no doubt they may be controlled and restricted by a reference to particular bounds. And it may be, that the words "already bounded" were intended at the time of the grant to have this effect. But the difficulty is, that there is no evidence whatever of the bounds referred to in the grant, and in absence of all proof of ancient bounds, the grant must operate according to the general description of the estate granted.

It has been argued, that the erection of the mill dam was a contemporaneous construction of the extent of the grant;[1] and that we are to presume that the bounds referred to in the grant were at the place where this dam was erected. But there seems to be no ground for this presumption, for it is clear that more land was granted than was intended to be used for the accommodation of the mills; as the grant includes a tract of land situated in Braintree. When words are used in a grant, which have a clear and definite meaning, they are not to be restrained by conjectures, or by other words, the meaning of which cannot be clearly ascertained. We are therefore necessarily brought to the conclusion, that the whole cove and marsh passed by the grant of the town, with the exception of prior grants.

[1] See *Choate* v. *Burnham*, 7 Pick. 274.

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It was remarked in the argument, that no flats were granted; but the case shows that the whole cove consisted of flats, where the tide ebbed and flowed, low-water mark being below the mouth of the cove, and there being no natural channel in any part of the cove.

It was remarked also, that the mill holders themselves have 171
given a construction to their grant, by a long continued non-claim of the flats without the mill dam. But the contrary we think plainly appears by the evidence reported.

It appears by the records of the proprietors, that they voted to erect a sea wall on the north side of the dam, to be filled with mud from the flats, of a sufficient height to prevent all tides from passing over. It appears also, that in the year 1735 they granted a part of the flats outside the mill dam to Waldo and Cook, and it was admitted that the grantees entered and took possession, and that the land and flats conveyed are now held under the grant. The admission of this deed in evidence was objected to at the trial, but it was clearly legal evidence. It was not a mere declaration or claim of the proprietors, (although it might have been admitted, if thus considered, to repel a presumption founded on a non-claim of the estate,) but it was an act done, and possession under the deed was, in some sense, the possession of the proprietors, for the deed contains divers covenants and conditions in their favor, which rendered the deed and possession under it very proper evidence for the consideration of the jury.

There were other acts of possession proved on the part of the mill holders, which it is unnecessary to notice particularly, as it is very clear that the proprietors of the cove never did abandon any part of the flats in controversy.

We are therefore of opinion, that the whole cove and salt marsh passed from the town to Simonds and others in the year 1643, and that the tenants are lawfully seised under that title, except as to that part which the demandant, and those under whom he claims, have gained by disseisin; as to which the jury have found in his favor. In regard to the residue, it cannot be maintained that any one has had an exclusive possession, so that as to that part the seisin follows the legal title.

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If therefore the flats without the mill dam did not pass to Simonds and others in the year 1643, the town continued seised thereof until the year 1807, when it was released to the tenants. So that on either ground the tenants are clearly entitled to the flats in controversy.

Judgment according to verdict.

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172 DAVID HALE *versus* THE MERCANTILE MARINE INSURANCE COMPANY.

Insurance on goods from Boston to Terceira, and at and from thence to port of discharge in the United States, a quarter per cent to be added to the premium for every other port used in the Western Islands. The vessel, without going to Terceira, went immediately to Graciosa, another of the Western Islands, where a loss happened. *Held*, that there was no deviation.

March 29th. INSURANCE was made on property on board the schooner Mary Eliza, at and from Boston to Terceira, one of the Western Islands; and at and from thence to port of discharge in the United States, for a premium of one and three quarters per cent, a quarter per cent to be added for every other port used in the Western Islands. The vessel sailed from Boston to Graciosa, one of the Western Islands, not having previously stopped at any other place, and while there a partial loss was sustained upon the property insured. The question was, whether there was a deviation, and the Court, upon the authority of *Houston* v. *New England Ins. Co.* 5 Pick. 89, held that the vessel was not obliged to go to Terceira first, and so there was no deviation; whereupon the defendants were defaulted.

Sumner, for the plaintiff.

Welsh, for the defendants.

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DAVID R. POIGNARD *versus* EBENEZER SMITH.

The purchaser of an equity of redemption sold by the sheriff on execution, obtains by the sale a seisin of the land, unless the mortgager is disseised at the time of the sale; in which case he obtains only a right of entry, and in order to maintain a writ of entry counting upon his own seisin, he must actually enter.

But whether he might not, without an entry, maintain an action by declaring specially upon the seisin of the mortgager, *quære.*

A disseisin may be effected without the actual knowledge of the owner of the land, acts of notoriety, such as putting a fence round the land or erecting buildings upon it, being constructive notice to all the world.

Where in a writ of entry the tenant files a claim for improvements, and the demandant claims that the value of the land without the improvements may be found, it is not necessary that a special issue be framed on the possession of the tenant; and if he has not been in possession six years, the jury may find that fact as a reason for not inquiring into the value of the improvements. 173

WRIT of entry to recover possession of a lot of land on the (late) mill pond, in Boston. The demandant alleged his own seisin within thirty years, and a disseisin by the tenant. The tenant pleaded *non disseisivit.* He likewise filed a claim for improvements, pursuant to the statute, and the demandant filed a claim that the jury should find the value of the land without the improvements.

At the trial, before the *Chief Justice*, the demandant produced office copies of a deed from the proprietors of the mill pond to John Peck, dated March 30, 1810, — of a deed of mortgage from Peck to Ruggles Whiting, dated March 31, 1810, — and of a judgment recovered in September, 1826, by Isaac Warner against Peck, and an execution thereon, on which the right of equity to redeem the mortgage was taken and, on the 13th of November, 1826, was sold and conveyed by the sheriff to the demandant.

At the time of the taking and sale, the tenant was in possession of the land, having three several shops or buildings thereon, for which he was receiving rent. Both Whiting and Peck were alive, but out of the Commonwealth at that time, and no person, as the representative or agent of either, was in possession of the land.

The tenant objected, that under these circumstances, the sale and deed of the sheriff conveyed no seisin to the demand-

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ant; so that whatever right may have been conveyed, this action could not be sustained; but the objection was overruled.

The Chief Justice instructed the jury, that the title and right to recover were sufficiently made out by the foregoing evidence, and that as the tenant had not attempted to show any title, or any possession long enough to constitute a defence, their verdict on the general issue must be for the demandant.

There were no buildings on the land six years before the commencement of the suit, except a blacksmith's shop at
174 the eastern end of it, which had been erected there by one Russell, on the supposition that the lot belonged to one Spear. The mistake being discovered, Russell quitted the possession of the shop and land; whereupon one Roberts, the occupant, gave the tenant a written memorandum, undertaking to pay him rent. This was on the 21st of October, 1821, within six years before the commencement of the suit. The tenant then rebuilt the blacksmith's shop, and soon after erected a carpenter's shop near the middle of the lot, and put at the western end another building, to which was attached a small office or counting-room drawn there from some other place; and ever since, the tenant has occupied or received rent for these several buildings.

There was likewise evidence on both sides, in regard to acts of ownership on the part of the tenant more than six years before the suit was commenced.

The jury were instructed, that if they were satisfied, from the evidence, that the acts of possession by the tenant, if any, before the six years, were done with a design to appropriate the lot to himself, they ought to go into the inquiry of the improvements and of the value of the land; but if not so satisfied, they need not make the inquiry. They returned a verdict, that the tenant had disseised the demandant, and that the tenant had not the actual possession six years before the commencement of the action.

A new trial was moved for, because of misdirection in regard to the action's being sustained without proof of seisin, as before stated; because the verdict was against the evidence in regard to the actual possession of the tenant, so as to bring

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him within the statute; and because the finding of the jury as to the six years' possession, was a finding of a fact not in issue.

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March 22d.

A. Townsend and *F. Dexter*, for the tenant, insisted that the mortgager was not seised at the time of the sale on execution; *Kennebeck Purchase* v. *Springer*, 4 Mass. R. 416; *Boston Mill Corp.* v. *Bulfinch*, 6 Mass. R. 229; *Brown* v. *Porter*, 10 Mass. R. 93; *Cummings* v. *Wyman*, ibid. 464; *Warren* v. *Childs*, 11 Mass. R. 222; *Higbee* v. *Rice*, 5 Mass. R. 344; *Small* v. *Procter*, 15 Mass. R. 498; and so no 175
seisin, and perhaps not even a right of entry, passed by the sale. *St.* 1798, *c.* 77, § 5; *Wellington* v. *Gale*, 7 Mass. R. 139, and 13 Mass. R. 489. The allegation, therefore, of the demandant's seisin is not supported. See also *Langdon* v. *Potter*, 3 Mass. R. 219; *Willard* v. *Nason*, 5 Mass. R 241; *Thorndike* v. *Barrett*, 2 Greenl. 312.

As the pleadings or motions stood, in regard to the limitation and settlement act, the jury were not authorized to find that the tenant had not been in possession six years. When the tenant alleges that he has had possession for that length of time, and makes a claim for betterments, the demandant ought to give notice, if he intends to contest the duration of the possession. By merely requiring the jury to find the value of the land without the improvements, he admits that the tenant has been in possession six years. *Bacon* v. *Callender*, 6 Mass. R. 303.

Shaw and *Bartlett*, *contrà*. The deed of the sheriff, of an equity of redemption, passes an actual seisin, so that the purchaser is not obliged to enter before he can bring a writ of entry. Anc. Chart. &c. 501; *St.* 1783, *c.* 57, § 4; 1798, *c.* 77, § 3, 5; *Gore* v. *Brazier*, 3 Mass. R. 523. If the mortgager is disseised, nothing will pass by his deed; but with the sheriff's deed it is otherwise. By that, all the right which remained in the mortgager will be conveyed. *Porter* v. *Millet*, 9 Mass. R. 101; *Wellington* v. *Gale*, 7 Mass. R. 138, and 13 Mass. R. 483. Here the mortgager had a right to bring a writ of entry without making an entry, not having been disseised twenty years, and consequently the demandant had the same right. The sheriff, however, in levying

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on the equity of redemption, may be considered as making an entry, so as to defeat the disseisin ; to effect which an instantaneous seisin will be sufficient. Stearns on Real Actions, 16, 17. If any one was disseised, it was the mortgagee, and not the mortgager ; for an equity of redemption is an incorporeal hereditament, of which, from its nature, there cannot be a disseisin. 13 Mass. R. 487 ; Stearns, 13, 46 ; *Cholmondely* v *Clinton*, 2 Meriv. 357. But there was no disseisin, as the mortgager had no notice of any adverse claim. *Pray* v. *Pierce*, 7 Mass. R. 381.

176 The demandant's motion is that the jury may find the value of the land without the improvements, *if* they shall find that the tenant has had possession for six years ; so that there is no admission of such a possession.

April 5th. PARKER C. J. delivered the opinion of the Court. The question in this case, which has principally attracted our attention, is, whether the sale and deed of the sheriff, under which the demandant claims, conveyed such a seisin of the premises as will sustain the action without a previous entry.

The demandant declares upon his own seisin, and must prove it. If the mortgager was seised at the time of the seizure on execution, then the sheriff's deed would have conveyed his seisin to the purchaser, for the statute gives the same effect to the sheriff's deed as the mortgager's would have, had he himself conveyed the right of redemption or the land subject to the mortgage ; but if the mortgager was not seised at the time of the sale, then the sheriff's deed could not convey a seisin, but only a right of entry, which must be executed, before a writ of entry could be maintained in which the demandant should declare on his own seisin.[1] Perhaps a special declaration founded upon the disseisin done to the mortgager would be good, for as the mortgager himself could have sustained a writ of entry, and the deed of the sheriff in effect conveys all his right to the purchaser, and he had a right of action without entry, by force of the statute and the sale the purchaser may have succeeded to this right. But in such case the seisin of the mortgager, and not of the purchaser, should be set out.

[1] See Revised Stat. *c.* 73, § 38 ; 1 Powell on Mortg. (Rand's ed.) 156, note

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I do not know how this escaped me at the trial, for it certainly is a very clear point; and the demandant having declared on his own seisin, on evidence of an actual disseisin of the mortgager continuing to the time of the sale, the action was gone.

The point, though presented at the trial, had another aspect to my mind, for I thought the tenant's counsel relied upon it to show that nothing passed by the deed of the sheriff, because there was an adverse possession at the time. I thought then, and now think, that the deed was not void on that account; for if it be, it would follow that creditors have no 177
means of taking rights of redemption for satisfaction of their debts, whenever the mortgager may have been disseised. The entry of the sheriff could not purge the disseisin, for his entry is not necessary to a sale, and he need not be on the premises for the purpose. The judgment creditor could not enter, for he has no right in the land until after the levy, and the purchaser has no interest until after the sale. The mortgager could not be expected to enter for the purpose of having the land taken from him by execution. The sale and deed of the sheriff therefore, under such circumstances, must pass the right, and if there is no disseisin, it passes a seisin in fact as well as law; if there is a disseisin, it passes a seisin in law which gives a right of entry, and after the entry an action of entry sur disseisin.

It was formerly questioned whether the sheriff's deed of an equity passed such a legal estate in the land as would enable the purchaser to maintain trespass or writ of entry, even where the mortgager was not disseised. But that doubt was removed by the decision in the case of *Wellington* v. *Gale*, 7 Mass. R. 138. On the trial of that cause the judge at *nisi prius* ruled that the demandant, who was a purchaser of the equity, could not sustain his action, for want of an actual entry under the deed. This decision was overruled, and it was held that the sheriff's deed conveyed an actual seisin when neither the mortgagee nor his heir had entered under the mortgage, and that the purchaser might maintain an action against any stranger, unless he had in fact disseised the mortgager before the sale of the equity. This qualification of the right, though not

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affirmatively stated, is undoubtedly sound in principle, because if the mortgager is disseised, there is no seisin to convey by the sheriff's deed. This doctrine was supposed by the demandant's counsel to be shaken by the case of *Porter* v. *Millet*, 9 Mass. R. 101, but it is on the contrary maintained by that case; the case of *Wellington* v. *Gale* being referred to in support of the point then before the Court, and the qualification necessary to be adverted to.

178 In a revision of the case of *Wellington* v. *Gale*, as reported in 13 Mass. R. 483, the doctrine in the original case is not called in question. This case also settles the point, that the sheriff's sale is not void because the mortgager may have been disseised, though a legal seisin may not have been conveyed. In short there is no discrepancy in the cases upon the subject, and the proposition contained in a negative form in the first case of *Wellington* v. *Gale*, that any entry of the purchaser under a sale of the equity is necessary when he declares upon his own seisin, is undoubtedly good law.

It is unnecessary to decide the other points raised in the case, as this is decisive against the action in its present form. It may be as well to observe, however, that a disseisin by the tenant at the time of the sale is clearly made out by the facts, he having several buildings on the premises placed there by himself, and receiving the rents and profits therefrom.

It was said that there cannot be a disseisin without notice, and that as the mortgager and mortgagee were out of the Commonwealth, they would not be disseised; but acts of notoriety, such as building a fence round the land or erecting buildings upon it, are notice to all the world. [1]

The tenant's objection to the finding of the jury in regard to the possession, we think not well founded; there is no need of a special issue on the possession, in regard to the value of the improvements. The jury did right in assigning the reason for not going into that subject.

New trial granted. [2]

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[1] See *Alden* v. *Gilmore*, 13 Maine (1 Shepley) R. 178; Stearns on Real Actions, 43, 44; *Little* v. *Libby*, 2 Greenl. 242; *Robinson* v. *Swett*, 3 Greenl 316; *Kinsell* v. *Daggett*, 2 Fairfield, 314.

[2] See *Poignard* v. *Smith*, 8 Pick. 272.

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GEORGE BRINLEY *et al. versus* CHARLES F. KUPFER.

Where in an action between partners to recover the balance due from the defendant upon the dissolution of the firm, the plaintiff obtained a verdict, but it appeared at the trial that there was one debt against the firm which had not been paid, the plaintiff was nevertheless permitted to take judgment, upon releasing to the defendant the amount of that debt.

ASSUMPSIT to recover one third of the loss on a manufactory of glass bottles, carried on by the two plaintiffs (Brinley and Stimpson) and the defendant, in copartnership. Trial before *Parker* C. J.

The jury found that the copartnership had been dissolved by mutual consent.

It appearing in the course of the evidence, that there were two outstanding claims against the company, at the commencement of the suit, and which remained still unpaid, the defendant contended that the action could not be sustained.

One of these claims (for 7 dollars and 25 cents) was the bill of an auctioneer, who was employed to sell a lease of the establishment, and the implements, for advertising, &c. This, at first, was charged by the auctioneer to Kupfer, but the bill, at the request of Kupfer, was made out to George Brinley & Co.

The other claim (for 45 dollars) was a bill for materials, in favor of one Dow. Dow testified that he had presented it to Brinley & Co., who said it must be approved by Kupfer, and he then applied to Kupfer, who declined approving it.

Kupfer was the superintendent of the works, receiving a salary, and he had the whole care of the works, workmen, &c. Brinley & Co. furnished the capital, kept the accounts, purchased and paid for all materials, and made sale of all the manufactured stock, and had possession of all the partnership funds.

If by reason of the abovementioned outstanding debts, the action could not be sustained, the verdict, which was in favor 180
of the plaintiffs, was to be set aside and a nonsuit entered; but otherwise judgment was to be rendered on the verdict.

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S. D. Ward, for the defendant, insisted that one partner cannot maintain assumpsit against his copartner, until all the accounts have been settled and a balance been struck. Gow on Partn. 35; *Fanning* v. *Chadwick*, 3 Pick. 423; *Bond* v. *Hays*, 12 Mass. R. 34. A different rule will render the defendant liable to the outstanding debts while he is paying money to the plaintiffs, and if he shall discharge these debts, he may then sue the plaintiffs for contribution: thus the balance between copartners may be continually shifting and there will be no end to litigation. The plaintiffs may become insolvent immediately after a recovery, leaving the defendant liable for these debts; a risk to which, in justice, he ought not to be exposed. The plaintiffs cannot allege any wrong on the part of the defendant. They might have discharged every debt before they commenced their action.

S. D. Parker and *Brinley*, on the other side, admitted that by the English authorities this action might not lie, but they said that under our own decisions it was sustainable. The demand of the auctioneer arose after the dissolution of the copartnership; so that in truth there was but one outstanding debt; and in *Robson* v. *Curtis*, 1 Stark. R. 78, Lord *Ellenborough* says, that if only one item remained unadjusted, the difficulty as to partnership would disappear. But if both the debts in question are against the copartnership, we say that assumpsit may be maintained where account will lie, and account would lie in this instance. *Eveleth* v. *Brigham*, 9 Mass. R. 538; [Rand's ed. 542, note *a*;] *Wilby* v. *Phinney*, 15 Mass. R. 116; [Rand's ed. 121, note *a*, and 122, note *a*;] and the cases before cited. The defendant ought to have approved of Dow's claim and it would then have been paid. He is estopped now to say it was due, for he shall not take advantage of his own wrong.

Ward, in reply, said, the charge of 7 dollars and 25 cents, being incurred in closing the partnership concerns, was a partnership debt, as much so as if it had arisen before the dis-
181 solution. The principle that assumpsit can be maintained where account would lie, is not applicable to this case; otherwise assumpsit might be brought before any of the partnership debts have been paid.

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Per Curiam. The principal question put to the jury was, whether the dissolution of the copartnership was by mutual consent. This was made out in favor of the plaintiff, and so each partner was bound to share in the loss, in the proportion settled by the articles of copartnership. So far then the action is supported. But it appeared that there were two outstanding claims, and it was insisted by the defendant, that assumpsit will not lie by one partner against another, while debts against the firm remain unpaid; and for a good reason, that the defendant partner may be called upon to pay the debts. We do not however think that this verdict ought to be set aside. The claim for 7 dollars and 25 cents was for advertising the dissolution. It was first charged to the defendant, and afterwards, at his request, to Brinley & Co. We consider it as a charge to Brinley and his partner, Stimpson. But Dow's claim for 45 dollars is a partnership debt. Brinley declined paying it, because it was not certified by Kupfer, and it remains outstanding. However, as the case has been rightly tried, if the plaintiffs will release to the defendant the amount of this debt, (by which they will pay his share of it,) he will be put on the best ground he can ask for, and by the principles of justice the verdict may stand.[1]

[1] See *Williams* v. *Henshaw*, 12 Pick. 378; *S. C.* 11 Pick. 79; *Fanning* v. *Chadwick*, 3 Pick. (2nd ed.) 423, note 1, and 424, note 1; Collyer on Partn. 153, 154, and note 45. Where there is a settlement between partners, and a promise by one to pay to the other a balance struck, an action at law may be maintained, although by accident or otherwise some trifling debts owing by the firm remain unadjusted. *Clark* v. *Dibble*, 16 Wendell, 601.

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GEORGE WELLES *et al. versus* BOSTON INSURANCE COMPANY.

Insurance against fire was made on stock in trade, consisting of cutlery and jewelry, contained in a store. A fire happening in the neighbourhood, the insured, with the approbation of the insurer, procured blankets and spread them on the outside of the store, whereby the building and its contents were preserved, but the blankets were rendered worthless. *Held* that this loss was not covered by the policy, but that it was a subject of general average, to which the insurer and insured should contribute in proportion to the amount which they respectively had at risk in the store and its contents. *Held* also, that buildings in the neighbourhood which would have been endangered if the store had taken fire, and upon some of which the defendants had made insurance, were too remotely affected to be liable to contribution.

ASSUMPSIT on a policy of assurance, whereby the defend ants caused the plaintiffs to be assured 20,000 dollars on goods, being their stock in trade, contained in store No. 69 Washington street, Boston, against loss by fire, for the term of one year.

At the trial it appeared, that a fire took place within the year, *viz.* in November, 1825, in Court street, near which the store was situated, and that by means thereof the store and its contents were in great danger. The stock, consisting of valuable military implements and jewelry, and such articles as are usually comprehended in a jeweller's stock, was removed to places of security, and the loss and damage happening to it was adjusted and paid. While the fire raged, the store being in imminent danger and the heat so great as to render it hazardous to continue long in packing up and removing the goods, it was proposed by a witness, who was then aiding in the preser vation of the property, to procure blankets to spread on the outside of the store, where it was exposed to the flames. The president of the insurance company was there, and upon being asked by Welles his opinion of it, said if it was thought to be useful, he should like to have it tried. Whereupon a bale of blankets was procured by Welles, which being wet and hung out of the windows, were of essential service in stopping the
183 progress of the flames, and in enabling the persons in the store to remove the goods. From the state of the weather and the course of the wind, it was considered by many persons pres

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ent, that had this building taken fire, the flames would have been communicated to the old State-house, in State street, and that then the conflagration would have been very extensive. The defendants were largely engaged in insuring against fire, and at this time there was a subsisting policy for 30,000 dollars on a building near the State-house.

The cost of the blankets used for the above purpose was 93 dollars, and they were so nearly destroyed by the fire as to be wholly worthless. The plaintiffs paid for them, and demanded from the defendants an entire indemnity. The defendants contended, that if they were liable at all, it was only for the proportion which they had at risk upon the policy, taken in connexion with the store of which the plaintiffs had a lease for ten years, and the value of the stock over and above the sum insured upon it. The amount of the plaintiffs' stock at the time of the loss was stated by them at 35,000. The store was estimated to be worth 5000 and the lease 5000. On these data the defendants estimated their proportion of the loss by the blankets, and they brought into court, under the common rule, a sum of money exceeding such estimate.

If the defendants were right, in supposing that they were not liable for the loss, beyond a fair proportion calculated on the above principles, and in regard to the subjects of contribution, the plaintiffs were to become nonsuit; otherwise, &c.

In the policy it is provided, that the "company shall not be liable for more than the sum insured in any case whatever," — and that "in case of any loss, the same is to be paid without any deduction."

Cooke, for the plaintiffs. Supposing the blankets to have been a part of the stock insured, the plaintiffs' right to recover for the whole loss upon them cannot admit of a question. But if they were not, we contend that a fire policy is not the subject of apportionment like a marine policy. In the case of a sacrifice to prevent a marine loss, the master is the agent of all the parties interested; here there was no common agent. According to the authorities, all the interests benefited by the sacrifice must be brought into contribution. Phillips on Ins. 364. This is equitable and may be easily effected in the case

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of a loss at sea; but here it is impracticable. The sum insured for the plaintiffs was trifling, in comparison with the whole amount which the defendants had at risk in the vicinity of the fire. In marine losses the master's lien affords a means of compelling contribution; which is wanting in the case of a fire policy. No precedent is to be found, where the principle of average has been applied to insurance against fire, and the only dictum we have seen upon the subject is in our favor. Phillips, 375, note. From the very terms of this policy, there can be no average. The insurance is "against *all* loss or damage to the goods by fire, &c. provided that the company shall not be liable *for more than the sum insured*, in any case whatever;" and the defendants have settled the loss on the jewelry accordingly. If however this is a case for an average, the plaintiffs must recover the whole loss, and the defendants are to obtain contribution from the several persons liable. *Maggrath* v. *Church*, 1 Caines's R. 215. But in case the plaintiffs shall recover only a proportion of the loss, they are entitled to a larger amount than the defendants have tendered. All persons having property which was endangered by the fire and saved by the precautionary measures in question, ought to bear a proportion of the expenses; and if strangers cannot be brought in, there is at least no good reason why the defendants should not contribute for the whole amount which they had insured upon property in the neighbourhood of the fire.

Loring, for the defendants. The blankets were not carried to the store as a part of the stock, but for the express purpose of being exposed to the fire; of course they were not insured by the policy. The only principle upon which the plaintiffs can recover any thing, is the one against which they contend, namely, that of general average. The case finds a consent on the part of the defendants, that the blankets should be pro-
185 cured, but that subjects them to no greater burden than would otherwise have been imposed upon them by the law. The principle is, that parties having a common interest in property, shall each sustain a fair proportion of a sacrifice made or expenses incurred in relation to it for the common benefit. This principle has time out of mind made a part of the law of marine insurance, and the reason of it applies with equal force to

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policies against fire. The law of contribution by co-sureties is analogous; which does not proceed on the ground of contract, for co-sureties contribute even where they execute distinct obligations, but upon a fixed principle of justice. *Deering* v. *Earl of Winchelsea*, 2 Bos. & Pul. 270. The objections raised are not to the rule itself, but to the mode of its application. It is said there was no common agent for these parties; but this objection can have no weight, for the principals were present, and the sacrifice was made with their concurrent assent. It is also said that if an average is allowed, remote interests must be called upon to contribute. All that we contend for is, that where parties have by contract united their interests, they shall bear their respective proportions of an expense for their common benefit. Here the insurer and the insured have so united their interests; and the same may be said of the owner of the store and the owner of the goods. But as it respects other persons, there was no intentional incurring of a common hazard. The fact that the defendants insured other property in the vicinity of this store, cannot affect the present case, for in respect to that, there was no community of contract between them and the plaintiffs. It is objected too, that there is no lien to compel contribution; but an action like this, for money paid, furnishes an adequate remedy. The plaintiffs further say, that the defendants stipulate to pay *all* loss by fire, provided that they shall not in any case be liable for more than 20,000 dollars. But the loss in question is not within the policy; and the object of the proviso was to prevent the insurers from being responsible beyond the sum mentioned, in case of successive fires. The decision in Caines is good law, but it does not apply, because the plaintiffs are a party liable to contribute. The defendants cannot pay them the whole expense, and then sue to recover back a 186
proportion of it. The items which are liable to contribute are, goods insured, of the value of 20,000 dollars, goods not insured, of the value of 15,000, the lease, worth 5000, and the building, worth 5000; so that the defendants ought to bear only four ninths of the expense in controversy, but they do not object to paying one half.

Per Curiam. The defendants refuse to pay the whole of *April 5th.*

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the loss on the blankets, on the ground that they were not included in the policy; offering however to contribute in proportion to the interest which the parties respectively had at risk. The plaintiffs refuse to accept less than the whole, because they say that the blankets were part of their stock in trade. But there seems to be no foundation for this pretension.

The plaintiffs can claim then only on the ground of a sacrifice made by them for the preservation of the property endangered by the fire, and for a proportion of which sacrifice they are equitably if not legally entitled to recover. They contend however that this is not a case proper for contribution, it being customary on fire policies to pay the whole loss. We believe the practice to be as stated, but as the present claim is not within the contract, it certainly is reasonable that the plaintiffs should bear a proportion of the sacrifice made for the common benefit. This decision does not call in question the general principle, that a loss under a policy against fire is to be paid without contribution.

But it is said that the plaintiffs and the defendants are not the only parties who ought to contribute, since all the property in the neighbourhood, on some of which the defendants had underwritten, was protected by the expenses in question. But it will not do to take so wide a range in the application of the principle of contribution. All the buildings in the city may remotely have been protected, and it would be impossible to draw the line. It is necessary therefore to limit the contribution to the building, and the property therein, immediately saved. The money brought into court is sufficient to cover the defendants' proportion of the expenses, and the plaintiffs must be nonsuited.[1]

[1] See 2 Phillips on Ins. 228, 229; 3 Kent's Comm. (3d ed.) 375, 376.

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HENRY VANDINE, Petitioner, &c.

A by-law of a city is binding upon strangers coming within the territorial limits of the city.

A by-law of the city of Boston, prohibiting any person not duly licensed therefor by the mayor and aldermen, from removing the house-dirt and offal from the city, was held not to be in restraint of trade, but to be a valid by-law.

PETITION for a writ of certiorari to the Municipal Court of the city of Boston. Vandine was prosecuted upon a by-law of Boston, passed in April, 1826, by which it is ordained, that no person shall remove, cart or carry through any of the streets, squares, lanes or alleys of the city, any house-dirt, refuse, offal, filth or animal or vegetable substance from any of the dwellinghouses or other places occupied by the inhabitants, in any cart, wagon, truck, hand-cart or other vehicle, unless such person so removing, &c. together with the cart, &c. shall be duly licensed for that employment and purpose by the mayor and aldermen, upon such terms and conditions as they shall deem the health, comfort, convenience or interest of the city require, on pain of forfeiting a sum not less than three dollars nor more than twenty.

It was proved at the trial, that Vandine transported house-dirt and offal from the yards of houses to his cart standing in the streets of the city.

Vandine being called on for his defence, it was agreed that he was an inhabitant of the town of Cambridge, and that he owned and kept there a large number of hogs.

The judge instructed the jury, that the subject of the regulation was one on which it was proper for the city to legislate, it having relation to the public convenience and the health of the inhabitants, within *St.* 1821, *c.* 110, § 15, 17, and *St.* 1785, *c.* 75, § 7; that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or be prejudicial to the comfort of the inhabitants, and it was both reasonable and proper, that it should be in their discretion to contract with persons to perform the work, so that it might be done on a general system. If it were found on experiment, that the duty would not be thoroughly and

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faithfully performed, or would be attended with more expense to the city, if individuals should remove these substances in their own carts and upon their own account, it was competent for the city government to enact a by-law which should subject all such persons to the vigilance of that government, and which should require them to be first licensed. He further instructed the jury, that so far as, by virtue of the general laws of the Commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers; that the object of the by-law being to secure to the city the regular and effectual removal, by the public authority, of all sources of nuisance which are collected and accumulated in the houses in the city, by not suffering individuals, under no obligation of trust, to interfere in the same, it amounted to the prohibition of a nuisance; and that so far as it affected trade, it was not a restraint, but only a regulation of it.

To these directions and opinions the defendant filed exceptions.

March 31*st* *Dunlap*, in support of the exceptions, said that the by-laws of one town cannot bind the inhabitants of another; and no peculiar privileges are attached to Boston by reason of its being incorporated as a city. Those who come to *reside* within its territorial limits are subject to its by-laws, but not strangers, who have not the means of knowing the by-laws and do not enjoy the benefits resulting from them. 1 Wooddes. 498, cites 2 Ventr. 33, 34; Com. Dig. *Bye-law*, *C* 2; Anc. Charters, &c. 195; *St.* 1785, *c.* 75, § 7; 5 Dane's Abr. 145. If this by-law is essential to the welfare of the city, application should be made to the legislature to empower the city government to pass such an ordinance. It is said the object of it is to preserve the health of the city. Had its operation been limited to the hot months, the remark would have more plausibility. But admitting the assertion to be true, the acts done by the defendant were in furtherance of that object.

The by-law is void, being in restraint of trade. Supposing
189 it to be valid, the city have a monopoly in the raising of swine

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If strangers, or individuals generally, are not allowed to remove offal, the city government may oblige the inhabitants to give it away. That the city may direct the time and manner of removing filth, is not denied; but they have no right to say that it shall be removed only by persons having a license. 1 Rol. Abr. 364, *pl.* 5; Anc. Charters, &c. 170; *Harrison* v. *Godman*, 1 Burr. 12; *Bosworth* v. *Hearne*, 2 Str. 1085; *Ipswich Taylor's Case*, 11 Co. 53; *Case of Monopolies*, ibid. 87.

Curtis, *contrà*, cited to the first point, 2 Kyd on Corp. 103; 1 Rol. Abr. 365, *pl.* 8; *Chamberlain of London's Case*, 5 Co. 63; *Cuddon* v. *Eastwick*, 1 Salk. 192; *Butcher's Company* v. *Morey*, 1 H. Bl. 370; *Pierce* v. *Bartrum*, Cowp. 269; — and as to the authority of the city to pass the by-law in question, *St.* 1785, *c.* 75, § 7; 1816, *c.* 44, § 2, 3, 8; 1821, *c.* 110, § 17; Com. Dig. *Bye-law*, *C.*

April 5th.

PUTNAM J. delivered the opinion of the Court. The first objection is that this by-law is not binding upon strangers, if it should be considered as binding upon the citizens of Boston.

Some by-laws are binding upon strangers as well as upon the inhabitants or members of the corporation, and some are not. The distinction is between corporations united as a fraternity for the purposes of business, having no local jurisdiction, and corporations having a territorial jurisdiction; the former have not, but the latter have power to make by-laws binding upon strangers.

For example; a by-law of the corporation of Trinity House, "that every mariner, within twenty-four hours after anchorage in the Thames, put his gunpowder on shore, does not bind, because the corporation has no jurisdiction upon the Thames." Com. Dig. *Bye-law*, *C* 2.

In the case of *Dodwell* v. *The University of Oxford*, 2 Ventr. 33, the Chancellor's Court of the University made a by-law, that whoever, privileged or not privileged, should be taken walking in the streets at 9 o'clock at night, having no reasonable excuse, by the proctor, &c. should forfeit, &c. And it was held that the corporation could not make a by-law binding upon any who were not of their body. They

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went beyond their jurisdiction, which could not be considered as extending to the inhabitants of Oxford who were not scholars. Regard is to be had to the nature of the incorporation; if it is a banking incorporation, for example, their by-laws must be confined to the proper mode of conducting their affairs. Where the corporation has a local jurisdiction, their by-laws affect all who come within it; for example, the by-law of the city of London, that no citizen, freeman or stranger, should expose any broad-cloth to sale within the city before it should be brought to Blackwell Hall to be examined whether it were saleable or not, was held binding upon strangers as well as citizens. 5 Co. 63.

So in *Pierce* v. *Bartrum*, Cowp. 269, a by-law of the mayor and common council of the city of Exeter, that no person should slaughter beasts or keep swine within the walls of the city, was held good against the defendant, who was not free of the city, but only residing there. He was considered as an inhabitant *pro hac vice*. So where the corporation have jurisdiction over all of the same trade or profession within certain limits, as the College of Physicians have for seven miles round London; whose by-laws regulating the practice of physic are binding upon all within those limits.

The by-laws which are made by corporations having a local jurisdiction, are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the Commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written. They receive the benefits arising from the municipal arrangements, and are presumed to assent to them, upon the same principle which requires from them a temporary allegiance to the state for the protection it affords to them during their residence. [1]

But it is contended that this by-law is void as it is in restraint of trade, and operates as a monopoly. Every regulation of trade is in some sense a restraint upon it; it is some

[1] It is enacted by the Revised Statutes, that the by-laws duly made by any town shall be binding upon all persons coming within the limits thereof, as well as upon the inhabitants thereof. *C.* 15, § 14. See Angell & Ames on Corp. 199, 200; *Davis* v. *Morgan*, 1 Crompt. & Jerv. 587; 1 Tyrwh. 457

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clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void;[2] if necessary for the good government of the society, it is good.[1]

The case cited by the counsel for the defendant from 1 Ro'. Abr. 364, was of the former character. The mayor and commonalty of London made a by-law, that no carman within the city should go with his cart, without license from the wardens of such an hospital, under a certain penalty for each offence; and it was held to be a void by-law, because it was in restraint of the liberty of the trade of a carman, and it was held to be unreasonable, because it went to the private benefit of the wardens of the hospital, and was in the nature of a monopoly. Now we think that case was rightly decided; it was an act of oppression. We perceive no reason why the wardens of the hospital should have a superintendance and control of all the business of the carmen, thus laying them under a contribution at the will of the wardens.

To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city, which would be absurd in the country. The cases upon this subject are well collected by Baron *Comyns* in his Digest, title *Bye-law*. It has been found to be reasonable in the city of London, to provide that brewers' drays should not be in the streets there after eleven o'clock in the morning in summer, and one in winter; that no person should unlade coals out of a barge, if he be not of the porter's company; thus in some manner restraining trade.

There have been regulations also adopted in that city, that none shall be brokers unless licensed and sworn; that none shall be hawkers without license; thus in some measure restraining the natural rights of the subjects. Now it is contended that the by-law under consideration is in restraint, and not a mere regulation, of the trade in which the defendant is

[2] See *Clark* v. *Le Cren*, 2 Barn. & Cressw. 59; *Hesketh* v. *Braddock*, 3 Burr. 1847; *London* v. *Compton*, 7 Dowl. & Ryl. 597; *Shaw* v *Pope*, 2 Barn. & Adol. 465.

[1] See Revised Stat c. 15, § 13.

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engaged; that he provides as good and tight carts as the men do who are authorized by the city, in the performance of this labor. We do not perceive that there is any more reason to complain of the law requiring a license to do this work, than of the law prohibiting the keeping of livery stables in any place not licensed. One might just as well complain of the regulation which prevents him from being an auctioneer without license; and so of various other trades and concerns which it is found necessary to subject to such restriction.

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The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expense which is deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. It is obvious, that the object and interest of the city, and those of the carmen, in this concern, are extremely different. But it is contended that the city authorities may regulate strangers and unlicensed persons, in regard to the number of horses and kind of carts to be employed, just as well as they can carts and the conduct of the licensed persons. It seems to us, however, that the city authority has judged well in this matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit, to do this work in the best possible way and time. *Practically* we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements, nor annoy the in-

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habitants. We are all satisfied that the law is reasonable,[1] and not only within the power of the government to prescribe, but well adapted to preserve the health of the city.

The direction and opinion of the judge of the Municipal Court was entirely correct.

SILAS PIERCE *versus* WILLIAM THOMPSON. 193

T having been a partner in trade with P, and the firm having occupied a store belonging to the heirs of one on whose estate T was administrator, T brought an action for money had and received against P to recover a general balance, and likewise actions in the names of the heirs, but without their knowledge, against P and himself for rent. All these suits were submitted to arbitrators, with an agreement that they should consider the rent as having been paid by T, and they awarded that a certain sum was due to him. In an action by P against T for bringing these suits alleged to be malicious, it was *held* that P, in order to prove malice, might show that nothing was due from him in the first suit as the partner of T.

Held also, that the submission and award were not conclusive evidence of probable cause for bringing the several suits, nor of a waiver of P's right to sue for damages on the ground of their being malicious.

A witness having testified at the trial, that the partnership books were incorrect, T moved that an auditor should be appointed to audit the accounts, which motion was overruled. *Held*, that this was a matter within the discretion of the judge, and consequently that the refusal of the motion was no ground for setting aside the verdict.

Held also, that although where there are mutual dealings, if one party has not an opportunity of knowing both sides of the account, he may, to effect an adjustment, sue on the debit side, without regard to the credits, yet that in the case of a partner who may examine the books, such a proceeding, accompanied with an attachment of property, may be evidence that the suit was malicious.

Held also, that the several suits brought by T were not to be taken together as one, and therefore that a balance being found due to him upon them all collectively, did not disprove malice.

Held also, that T, being administrator, might be considered as having implied authority to institute the suits for rent, if his purpose was fair and honest; but that these suits, although they were not groundless, yet if they proceeded from malice, would sustain an action by P against T for malicious suits.

THIS was an action of the case for several malicious suits. The declaration contained four counts. The first related to a suit brought by Thompson in his own name, to recover a general balance which he alleged to be due to him from Pierce, who was formerly his partner in trade. The other counts related

[1] Whether a by-law be reasonable or not, is for the court to determine *Commonwealth* v. *Worcester*, 3 Pick. 462; Angell & Ames on Corp. 198.

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Pierce v. Thompson.

to three suits brought by the plaintiff against himself and Pierce in the names of the widow and two heirs of W. Thompson deceased, but without their knowledge, for the rent of the store occupied by Pierce and Thompson, while they were in partnership. Thompson was administrator on the estate of W. Thompson, deceased, and no division had been made of the real estate among the heirs. After the dis

194 solution of the copartnership, Pierce engaged in business by himself, and his whole stock in trade was attached in the suits above mentioned.

It appeared by the partnership books, that the defendant had charged the firm with the rent and credited himself as having paid it regularly every quarter, but that at the time of bringing the suits he had charged it back to the firm ; and that in truth he had never paid over to the lessors any rent from the commencement of the copartnership.

Thompson consented to release his attachments and to have an assignment made of the property for the benefit of Pierce's creditors, on condition that his claims should be satisfied before those of other creditors ; and the several suits were submitted to arbitrators, with an agreement that they should consider the rent as having been paid by Thompson. They awarded, that upon all the suits, taken together, a certain sum was due to Thompson ; but it appeared from the award, that excluding the claim for rent, a balance was due to Pierce.

The *chief justice*, before whom the cause was tried, instructed the jury, that as to the suits instituted for rent, the relation in which Thompson stood as administrator of an undivided estate, and his having collected rents in other instances, would justify his proceedings, if his object were merely to recover the rents and not to vex Pierce by multiplying suits.

The jury were further instructed, that to maintain the count for the suit in Thompson's own name, Pierce must show that nothing was in fact due in that suit, and that Thompson knew it, and had no reasonable apprehension that any thing was due, and that the suit was wholly groundless ; that the suit, being for money had and received, was in the nature of a bill in equity, and in deciding whether in point of fact any thing was due, all equitable allowances in the settlement of a partnership

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account should be made; that the submission of the claims made by Thompson and Pierce to the arbitrators, was not conclusive evidence that the suits were not malicious, and that the reference, assignment and discontinuance, should not preclude him from showing that they were groundless and malicious.

The defendant's counsel requested the judge to instruct the 195
jury, that it being proved and admitted, that after the institution of the suits an indenture was made, by which Pierce agreed that all the demands claimed in the several writs should be considered as a demand for one general balance claimed by Thompson, and should be submitted to the determination of arbitrators, whose award was to be conclusive, and it being proved that the arbitrators found a balance due from Pierce to Thompson, this was conclusive evidence of there being such probable cause as would in law amount to a defence to this action. And likewise, that the suits having been dropped in consideration of the submission, this was a waiver of any right of action for a malicious suit. But the judge refused to give such instructions.

After one Clark, a witness who had been employed by Pierce to examine the books of the firm, had given his testimony, Thompson's counsel moved that an auditor might be appointed by the Court to examine and audit the accounts, or that time might be given to examine the account as stated by Clark, as his testimony was a surprise on Thompson; but the judge overruled the motion.

The jury returned a verdict for the plaintiff; whereupon the defendant moved for a new trial.

The cause was argued at March term 1826, by *Fletcher* and *Cooke*, in support of the motion, and *Hubbard* and *Loring*, for the plaintiff.

Per Curiam. One objection on the part of Thompson, *March 29th*
the defendant, is, that the judge erred in instructing the jury, that with respect to the suit brought by Thompson in his own name, they might consider whether any thing was equitably, though not legally due from Pierce to Thompson.* The

* *Habershon* v. *Troby*, 3 Esp. R. 38, was cited by the defendant's counsel. *Reporter.*

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Court are clear that this instruction was correct. The suit was between persons formerly partners, for money had and received, and so equitable considerations were proper to be inquired into and allowed.

196 It was also contended, that as there was a submission and award from which it appeared, that including the rent, a balance was due to Thompson, this should be considered conclusive evidence of probable cause. But we think it was not, for the submission was after the injury had been done by the attachments, and it was advised by friends of the parties as necessary to the proposed assignment of Pierce's property.

It was further contended, that by the submission any claim for damages on account of the suits being malicious was waived, but we do not consider that to be the necessary consequence. * If it could not be pleaded in bar, and we think it could not, of course it would not be conclusive evidence of a waiver. The jury had the benefit of it as evidence, to assist them in determining whether the suit was malicious, and whether there was a waiver of the claim for damages.

Another objection is, that the judge refused to appoint an auditor or to delay the cause in order that Thompson might have an opportunity to examine the accounts. Clark, the witness, had spent two months in investigating the books, during which period he often saw Thompson, who admitted several of the charges to be incorrect. There being no specification of supposed errors in the account stated by Clark, the judge thought that if he had authority, he was not bound, to appoint an auditor, and that it was not reasonable to interrupt the trial. The Court are of opinion that it was a matter entirely within the discretion of the judge, and that the verdict cannot be set aside on that ground. [1]

The counsel for Thompson contended, that where there are mutual dealings, bringing an action on one side only of the account will not be evidence of malice. But this will depend on the circumstances. If the party has no means of knowing

* On this point *Forseth* v. *Shaw*, 10 Mass. R. 253, was cited for the defendant, and *Webster* v. *Lee*, 5 Mass. R. 334, and *Hodges* v. *Hodges*, 9 Mass. R. 390, for the plaintiff. *Reporter.*

[1] See Revised Stat. *c.* 96, § 25.

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the credit side, and his object is merely to have a settlement of the account, the action will not be malicious; but if a partner, having opportunity to examine the books of the firm, brings such an action when the balance is in truth against him, it may be evidence of malice.[1] If Thompson's object was only to effect an adjustment of the partnership concerns, he might have summoned Pierce, instead of attaching his whole stock in trade.

It was suggested, that all the suits should be considered as one action brought to produce a general settlement of all the concerns of the parties, so that if any thing was due from Pierce, there was no evidence of malice.* But this cannot be a correct principle, for then a man may at any time protect himself from the consequences of prosecuting a malicious action, by commencing at the same time an action founded on a valid demand.

In regard to the three last counts, for bringing suits for rent which were not groundless, but which are alleged to have been unauthorized, we think they were properly enough joined with the other count; but on the question whether they were sus tained by the evidence, there is a division of opinion. As Thompson was administrator, and had collected and paid over rents of other tenants, he might be considered as having had an implied authority in this instance, if he had used it for a fair and honest purpose; but the jury must have considered that the suits were brought to vex and harass Pierce. The judges who think the verdict ought to be set aside, proceed on the ground that there was some cause of action, and that as the form and number of the suits were not directed by Thompson, but were left to his counsel, he is so far justified. The other judges consider, that there being no express authority from the widow and heirs to bring the suits, and he having recharged the rent in such a manner as to require more than one action, he might be answerable as intending to swell the costs. They

[1] See *Austin* v. *Debnam*, 3 Barn. & Cresw. 139; 2 Stark. Ev. (5th Am. ed.) 499.

* *Wetherden* v. *Embden*, 1 Campb. 295, was cited for the defendant. *Reporter.*

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think there was evidence which might satisfy the jury of a malicious purpose.*

Motion to set aside the verdict overruled.

198 ELISHA COPELAND Junior *versus* THE MERCANTILE INSURANCE COMPANY.

A vessel was owned by the plaintiff, the master, A and B, one quarter each; and the plaintiff effected insurance upon her in his own name for whom it might concern, for six months. Before she sailed, he gave a power of attorney to one P to sell his quarter, and in a subsequent letter of instructions he and A authorized P and the master to sell their respective quarters after the delivery of the outward cargo. After such delivery a bill of sale under seal, of the two quarters belonging to the plaintiff and B, was made by P alone to the master for himself and A, and the master drew bills upon A in favor of the plaintiff and B for the purchase money, which were protested for non-acceptance. The vessel was lost after the sale and within the six months, but the loss was not known until after the bills had been protested. In an action on the policy by the plaintiff for the benefit of the assured; —

It was *held*, that the power of attorney to P alone was revoked by the subsequent letter of instructions to him and the master; —

That a sale in pursuance of such instructions must be made by the master and P jointly; —

That the deed of sale being in the name of P, and signed "P, attorney to C," (the plaintiff,) was insufficient in point of form; —

That the master, being an agent to sell, could not himself be the purchaser, and so nothing passed to him by the sale; —

That as A repudiated the sale, and the ratification, if any, on the part of the plaintiff and B must have proceeded on the ground that A was a joint purchaser with the master, the sale was entirely invalid, and so the ownership of the vessel remained the same at the time of the loss as at the date of the policy; —

That a revocation by the master, pending the action, of the plaintiff's authority to claim indemnification for the master's quarter part of the loss, did not affect the plaintiff's right to recover in this action for the other three quarters; —

And that he might so recover under counts alleging respectively, that the insurance was made for the benefit of one of the owners, and that he was interested to the whole amount insured.

ASSUMPSIT on a policy of insurance, made on the 17th of September, 1825, by which the defendants assured for the plaintiff, for whom it might concern, 3600 dollars on the brig Joseph and appurtenances, for the term of six months from the 20th of the same September.

* *Ravenga* v. *Mackintosh*, 2 Barn. & Cresw. 693, was cited for the plaintiff. *Reporter.*

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The *first* count alleged the insurance to have been made for the benefit of the plaintiff, William Bright and Joshua Seaver, one quarter for each, and one quarter for Porter & Greene. The *third* alleged it to have been made for the benefit of Seaver, and that he was interested to the *whole* amount insured upon the vessel. The *ninth* was similar, substituting Porter & Greene for Seaver. The *fifth* alleged it to have been made for the plaintiff's own account and benefit, and that he was interested *one quarter part* in the vessel.

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A total loss happened on the 2d of March, 1826, while the vessel was on her passage from Monte Video to Boston. The defence was, that at the time of the loss no part of the vessel was owned by the plaintiff, nor by any person for whom he had caused the insurance to be made, except Bright, (who it was alleged disavowed the action,) and Seaver.

At the time of making the policy, the vessel was owned by the plaintiff, Seaver and Bright, one fourth each, and the remaining fourth by Porter & Greene. The plaintiff acted as ship's husband in fitting her out, and had authority to make insurance on the whole vessel. By a letter of instructions, signed by the plaintiff and Seaver, dated October 22, 1825, and delivered the same day, the care of the brig and cargo was committed to Bright, who was the master, and John Pedrick 3d, with instructions to proceed from Boston to Buenos Ayres, and there deliver the cargo. The letter adds, "having accomplished this, we wish the vessel to be sold, if it can be done at such a price as yourselves, who represent the other half of the vessel and cargo, think reasonable." By a letter of attorney, dated the 15th of October and acknowledged before a notary public on the 21st, the plaintiff authorized Pedrick alone to make sale of his quarter part of the vessel, stating that she was then bound on a voyage to the Brazils. On the 18th of February, 1826, at Monte Video, in consideration of 1700 dollars received of Bright, Pedrick made a bill of sale of one half of the vessel to Bright and Seaver. This instrument, in the body of it, purported to be a conveyance by Pedrick personally, but was executed in the following manner: — "John Pedrick 3d, attorney to E. Copeland jr.", and a seal. "Porter and Greene by John Pedrick 3d," and a seal. There

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was no evidence in the case of any authority from Porter & Greene to Pedrick to sell the brig, or from Seaver to Bright to purchase any part of her.

The plaintiff contended that Pedrick had no authority to sell his share, nor that of Porter & Greene; that if he had authority to sell for him, it was not executed in such a manner as to pass the property; and that Bright had no authority to purchase for Seaver. The defendants insisted that Pedrick had lawful authority to sell, and that it was duly executed.

Two bills of exchange, one in favor of Porter & Greene for 425 dollars, the other in favor of the plaintiff for 850 dollars, were drawn by Bright on Seaver for the price agreed for the purchase between Bright and Pedrick, 425 dollars being paid in cash towards the share of Porter & Greene, and passed to their credit in Pedrick's account with them. These bills were remitted by Pedrick, but on presentment were not accepted, but were protested; and they were also protested for non-payment. The protest for non-acceptance was before notice of the loss of the brig was received.

On the 23d of March, 1827, Bright executed a sealed instrument revoking the authority of the plaintiff to claim of the defendants indemnification on account of the loss of Bright's quarter part insured as before mentioned; and notice of such revocation was given on the 22d of November, 1827, (pending this action,) to the defendants, accompanied with a demand in Bright's own name for indemnification, and on the 23d to the plaintiff.

The defendants contended, that from certain correspondence in the case between them and the plaintiff, it appeared that there was, in point of law, a ratification of the doings of Pedrick in regard to the sale of the brig; which legal inference was denied by the plaintiff.

In order to have the matters of law arising on the several instruments settled, as also the effect of the correspondence, a verdict was taken for the plaintiff, subject to the opinion of the Court.

March 14th. *Fletcher*, for the defendant. The interest of the persons for whom the action is brought, must be proved as it is alleged. *Gardner* v. *Bedford Ins. Co.*, 17 Mass. R. 613. The plain

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tiff could originally recover, if at all, only on the first count; but Bright has revoked the authority to prosecute for his benefit, and the proof does not now support that count. Paley Princ. & Ag. 134, 135; 3 Chit. Com. & Manuf. 223, 224; *Bristow* v. *Taylor*, 2 Stark. R. 50; *Sargent* v. *Morris*, 3 Barn. & Ald. 281.

On the counts alleging the *whole* interest insured to have been in some one of the owners of the vessel, the plaintiff cannot recover, because the proof is, that no more than a *quarter* was owned by any individual. *Graves* v. *Boston Mar. Ins. Co.* 2 Cranch, 419; *Lawrence* v. *Sebor*, 2 Caines's R. 203; *Perchard* v. *Whitmore*, 2 Bos. & Pul. 155, note.

The interest of the plaintiff and of Porter & Greene in the property insured, had been transferred before the loss; the plaintiff therefore cannot recover in this, nor in any suit, for the loss on two quarters of the vessel. Phillips on Ins. 27. The bill of sale, it is true, is informal, and if it had relation to real estate, would be invalid, as Pedrick represents himself to be the grantor; but a ship may be transferred without deed, and the form of the instrument is consequently immaterial. It will be objected that Bright had no authority to purchase for Seaver; but the effect of that would be only to make Bright himself the purchaser.

Admitting that in consequence of the letter of instructions giving a *joint* authority, Pedrick *alone* had no power to sell nor Bright to purchase, yet in fact there has been a ratification of the sale, at least so far as regards the plaintiff and Seaver. Pedrick and Bright, by letters dated in February, 1826, informed the plaintiff of the sale, and he, after the receipt of them, wrote to the defendants that Seaver and Bright were the sole owners of the vessel; and on the 26th of April a policy was made out accordingly, and Seaver gave his note for the premium.

Curtis, *contrà*, referred to most of the authorities cited in the opinion of the Court; and in regard to Bright's interference in the action, he cited *Offley* v. *Warde*, 1 Lev. 235, and *Doe* v. *Brewer*, 4 Maule & Selw. 300.

MORTON J. delivered the opinion of the Court. This is *March 29th* an action of assumpsit on a policy of insurance upon the brig

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Copeland v. Mercantile Ins. Co.

Joseph for six months. The loss within that time by a peril insured against, and a reasonable notice and offer to abandon, are admitted.

202 The plaintiff procured the insurance to be made in his own name, for whom it might concern, and now alleges that it was made for the account and benefit of himself and three others, each of whom he avers was owner of one quarter part at the time of the loss as well as at the date of the policy.

It is agreed by the defendants, that the several persons named in the declaration were interested in the manner alleged, at the time of effecting the insurance; and the defence is, that the plaintiff and Porter & Greene had sold their parts of the vessel before the loss, and at that time had no insurable interest in her.

Before the loss, John Pedrick, assuming to act as the attorney of the plaintiff and of Porter & Greene, executed a bill of sale purporting to convey their half of the vessel to Bright and Seaver, the owners of the other half. The first inquiry will be whether any thing passed by this instrument.

Pedrick's authority to convey must have been derived either from the power of attorney of the plaintiff, or from the letter of instructions from the plaintiff and Seaver to Pedrick and Bright of a subsequent date. There is no evidence in the case of any other authority from either of the former owners. Neither of these was executed by Porter & Greene, and the act of Pedrick was wholly unauthorized by them.

That the power of attorney, while in force, authorized Pedrick to sell the plaintiff's quarter, cannot be questioned. But the letter of instructions subsequently written by the plaintiff and Seaver, gave to Pedrick and Bright a joint authority to sell the two quarters of the plaintiff and Seaver. This was inconsistent with the authority before given by the plaintiff to Pedrick alone, and when he received the instructions, he must have understood them as a substitute for the former authority They must therefore be considered a revocation of the power of attorney.

The letter of instructions conveyed to Pedrick and Bright
203 a joint authority, which neither of them separately could execute. Co. Litt. 112 *b*. 181 *b*; Paley on Principal & Agent,

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129 ; *First Par. in Sutton* v. *Cole*, 3 Pick. 244.[1] The bill of sale was therefore unauthorized. It is manifest, too, that even had there been sufficient authority in the agent, it was not properly executed. The deed ought to have been in the name of the principal, instead of the agent. It is not now the deed of the principal. Paley, 131, 132, 133, and cases there cited.[2]

This bill of sale was therefore ineffectual to pass the property of the plaintiff and Porter & Greene ; unless power may be derived from a subsequent ratification. The instrument is not so far void as to be incapable of becoming effectual by the adoption of the principals ; and this ratification may be by implication, as well as by a direct sanction.[3] The receipt by the owner, of the purchase money, would necessarily imply a ratification of the sale ; but to be binding on the principal, the ratification must be made with a full knowledge of all the circumstances. Paley, 143, 144 ; *Smith* v. *Cologan*, 2 T. R. 189, note ; *Fenn* v. *Harrison*, 3 T. R. 757.[4]

In the case under consideration Pedrick communicated to the plaintiff the fact that he had sold, the price, and the names of the purchasers, and other circumstances attending the sale. The plaintiff expressed no disapprobation, but in applying for

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[1] See 2nd ed. 245 and notes ; 2 Kent's Comm. (3d ed.) 633, note *b*, and cases there cited.

[2] The rule that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds and not to simple contracts. *New England Mar. Ins Co.* v. *De Wolf*, 8 Pick. 56; *Andrews* v. *Estes*, 2 Fairfield, 267. See *Spencer* v. *Field*, 10 Wendell, 87 ; *Means* v. *Morrison*, 1 Breese, 172 ; *Minard* v. *Mead*, 7 Wendell, 68 ; *Elwell* v. *Shaw*, 1 Greenl. 339 ; *Stinchfield* v. *Little*, 1 Greenl. 231 ; *Colburn* v. *Ellenwood*, 4 N. Hampsh. R. 102; *Jordan* v. *Trice*, 6 Yerger, 479 ; *Magill* v. *Hinsdale*, 6 Connect. R. 464 ; *Hovey* v. *Magill*, 8 Connect. R. 680 ; *Berkeley* v. *Hardy*, 8 Dowl. & Ryl. 102; 5 Barn. & Cresw. 355 ; *Pentz* v. *Stanton*, 10 Wendell, 271 ; *Hills* v. *Bannister*, 8 Cowen, 31 ; *Barker* v. *Mechanics Fire Ins. Co.* 3 Wendell, 94 ; *Shelton* v. *Darling*, 2 Connect R. 435 ; 2 Kent's Comm. (3d ed.) 631 and note E ; *Spencer* v. *Field*, 10 Wendell, 87 ; *Montgomery* v. *Dorion*, 7 N. Hampsh. R. 475.

[3] See *Hanford* v. *M'Nair*, 9 Wendell, 54 ; *Blood* v. *Goodrich*, 9 Wendell, 68 ; 2 Kent's Comm. (3d ed.) 614.

[4] See *Thorndike* v. *Godfrey*, 3 Greenl 429 ; 2 Kent's Comm. (3d ed.) 616; *Owings* v. *Hull*, 9 Peters, 629 ; *Cunningham* v. *Bell*, 5 Mason, 168 ; *Bell* v. *Cunningham*, 3 Peters. 81.

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a renewal of the policy for another term of six months, expressly stated that the brig was owned by Seaver and Bright This could only have been true in consequence of his approbation of the sale by Pedrick. Also, upon the receipt of the bill drawn in payment for his quarter of the brig, he presented it for acceptance and demanded payment of it. These acts are sufficient evidence of a ratification on the part of the plaintiff.

The ratification of the sale on the part of Porter & Greene does not so clearly appear. According to the testimony of Pedrick, the money received in part payment for their quarter was placed to their credit and settled in their account. From the language used in his deposition, it does not clearly appear that this settlement was made with the knowledge and assent of Porter & Greene. They did, however, upon the receipt
204 of the bill drawn for the remainder of the price for which their quarter was sold, present it for acceptance and for payment. These circumstances strongly tend to show, and perhaps will warrant the inference, that they assented to and confirmed the sale on their part. But still the question will recur, whether this sale passed any thing to Bright and Seaver. Could Bright, being agent to sell, purchase either for himself or as agent for another?

It is a rule of law well settled, and founded in the clearest principles of justice and sound policy, that the agent of the seller cannot become the purchaser or the agent of the purchaser. These relations are utterly incompatible with each other. Paley, 32; *Barker* v. *Mar. Ins. Co.* 2 Mason, 369; *Church* v. *Mar. Ins. Co.* 1 Mason, 341.[1] The attempt of Bright to become the purchaser of a part of the vessel was a breach of trust on his part, and could not divest the other owners of their interest.

Seaver had given to Bright no power to purchase for him, but had authorized and instructed him with Pedrick to sell his part. This act of Bright was therefore wholly unauthorized. Has Seaver ever adopted it? After he received information of the purchase, he procured insurance to be effected upon

[1] See 1 Story's Comm. Eq. 310 to 312; *Rothschild* v. *Brookman*, 2 Dow & Clark, 188; 5 Bligh, N. S. 165; 3 Simon, 153; *Crome* v. *Bullard*, 2 Cox 253; *Lees* v. *Nuttall*, 1 Russ. & Mylne, 53.

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the vessel in his name for whom it might concern, for six months, to commence at the expiration of the former policy. It does not appear that he made a statement, or that any was made with his knowledge, of the names of the owners. This insurance might as well be procured by him, being owner of a quarter, as if he was owner of half. Nothing tending to show a ratification can be inferred from this circumstance. And the first opportunity which he has to act decisively upon the subject, he repudiates the contract. Before information of the loss of the vessel reached him, he refused to accept Bright's bills drawn in payment of the half which he had purchased. To hold this transfer to be valid, would be to compel him to become a purchaser without his consent.

Notwithstanding this breach of confidence on the part of Bright, the parties interested might waive all objection to his conduct and ratify his contract. And we have already seen that the acts of the plaintiff and of Porter & Greene have a 205
strong tendency to show such waiver and ratification. But these acts were founded upon a reasonable presumption, that Seaver and Bright were to become joint purchasers and jointly responsible for the purchase money. The refusal of Seaver to adopt the contract and to accept Bright's bill, produced such an entire change of circumstances as furnished to the plaintiff and to Porter & Greene sufficient reason for disavowing a contract which perhaps before they had intended to adopt. The bill of sale purporting to be a joint contract between the parties passed no property to Bright and Seaver, or either of them, and produced no change in the ownership of the vessel.

We are therefore all of opinion, upon the facts disclosed in the case, that Pedrick had no authority to make sale of the half of the brig, that Bright had no legal right to become the purchaser, either for himself or for Seaver, and that these unauthorized acts have never been so ratified as to change the property of the former owners. The interest in the vessel remained the same at the time of the loss that it was at the date of the policy; and is correctly stated in the first count in the plaintiff's declaration.

Since the commencement of the action Bright has disavowed it and annulled the authority of the plaintiff to prose-

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cute it, so far as that authority was derived from him. He might well prohibit the plaintiff from maintaining the suit for his proportion of the loss; but the policy was in the name of the plaintiff. The action is brought by him for the benefit of himself and the other owners; and it would be manifestly unjust that one owner, having received payment for his part of the loss, having compromised with the underwriters, or being unwilling to litigate the claim, should have the power to defeat the legal rights of the others. Bright might well revoke the power which he had given to the plaintiff to prosecute for his benefit, but he could not annul the authority which the other owners had given to sue for them, much less the right which he had to maintain the action in his own name for his own benefit. We are therefore well satisfied, that the plaintiff is entitled to judgment for his own quarter and those of Seaver and Porter & Greene, and the verdict must be amended accordingly.[1]

206 *April 4th.* After this opinion was delivered, *Fletcher* insisted that the declaration was insufficient. The plaintiff, being the agent in a joint contract for four, the action brought by him must be to enforce the whole contract. Besides, there is no count alleging the interest to be in three only, and the counts in which the whole interest is averred to be in some one of the three, are not supported by the evidence.

April 5th. But *per Curiam*. We were inclined to think the first count sufficient to sustain a judgment for three quarters of the sum insured; that as it stated correctly the interest of all the parties for whose benefit the suit was originally brought, the revocation by Bright of the authority to prosecute any further on his behalf, ought not to be allowed to prejudice the other parties concerned; but it is not necessary to determine this, as we are of opinion that judgment may be rendered for the plaintiff upon the other counts.

[1] See 2 Phillips on Ins. 379.

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ISAAC PIERCE *versus* ELISHA WOODWARD.

Where the defendant sold the plaintiff a grocery store for a sum of money stated in the deed, and agreed verbally not to carry on the same kind of business within a certain distance, it was *held* to be a sufficient consideration for this agreement, that the plaintiff was thereby induced to make the purchase.

Held also, that such agreement was consistent with the deed and did not relate to the conveyance of land, and so might be proved by parol evidence.

The jury may be asked by the judge upon what grounds they have returned their verdict, and if by their answer it appears that they have proceeded upon an erroneous principle, the verdict may be set aside.

THIS was an action upon a parol contract, not to set up the business of a grocer within a certain limited distance in the city of Boston.

At the trial, before the *Chief Justice*, it appeared in evidence, that the plaintiff had purchased of the defendant a parcel of land, with a store and dwellinghouse upon it, in Hanover street, the consideration expressed in the deed being 2500 dollars, which sum was paid. There was much parol evidence tending to prove that a principal inducement for the plaintiff to purchase, was the succeeding to the business which had been carried on in the same store by the defendant; and it 207
was proved to the satisfaction of the jury, that in order to induce the plaintiff to purchase, the defendant agreed not to engage in the same business within the limits alleged. This parol evidence was objected to as being inconsistent with the terms of the deed, and as relating to the conveyance of land.

It was proved that soon after the plaintiff had made the purchase, the defendant did openly carry on the same business in a store nearly opposite in the same street, within the limits described.

It was contended by the plaintiff, that 500 dollars of the purchase money was given for the agreement not to carry on the business as before stated, but there was contradictory evidence as to this, and it was not considered as proved.

The jury found for the plaintiff and gave 100 dollars in damages. The defendant insisted that they ought not to give damages for the injury except for the time between the defendant's setting up the business and the commencement of the

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action; and they were so instructed; but on inquiry upon what principle they proceeded, the foreman stated that they could not ascertain the damages for that precise time, it being very difficult to get at a knowledge of the degree of injury done, and that they gave the sum of 100 dollars, upon an expectation that it would settle the whole matter, and that no other suit would be commenced.

The defendant moved for a new trial, because the jury computed damages for the time subsequent to the commencement of the action, intending that their verdict should be in full for the plaintiff's claim for damages for the breach f the contract.

March 31st. *Morse* supported the motion. He also objected that the verbal contract was invalid, being in restraint of trade and not founded upon a valuable consideration. *Pierce* v. *Fuller*, 8 Mass. R. 223; *Perkins* v. *Lyman*, 9 Mass. R. 522; *Palmer* v. *Stebbins*, 3 Pick. 188. As to the inadmissibility of the parol evidence, he cited 3 Dane's Abr. 500, § 40; 3 Stark. Ev. 1004; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. R. 283; *Meres* v. *Ansell*, 3 Wils. 275.

S. D. Parker, for the plaintiff, to show that the parol evi-
208 dence was rightly admitted, cited 3 Stark. Ev. 1048; *The King* v. *Scammonden*, 3 T. R. 474; *The King* v. *Laindon*, 8 T. R. 379; *Jeffreys* v. *Walton*, 1 Stark. R. 267; *Shephard* v. *Little*, 14 Johns. R. 210. To show that after a verdict has been recorded, the declaration of a juror should not be received to impeach it, *Lincoln* v. *Hapgood*, 11 Mass. R. 358; *Grinnell* v. *Phillips*, 1 Mass. R. 542 (2d ed.) note.

Morse, in reply, said the inquiry made of the jury was proper, inasmuch as the object was not to prove misbehaviour, but merely that they had proceeded upon an erroneous principle.

April 5th. *Per Curiam.* Though the verbal contract, upon which this action is brought, was not a specific part of the bargain for the land, and did not affect the price, yet it appears that it was an inducement for the plaintiff to make the purchase; it is then founded upon a sufficient consideration. The defendant objects that it is illegal, being in restraint of trade; but such

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agreements, where the restriction is confined to small limits, are not against the policy of the law.[1] The admission of parol evidence to prove the contract was likewise objected to, but we do not consider the evidence as inconsistent with the deed or as affecting the conveyance of real estate.

A new trial must however be granted, because the jury, in assessing damages, did not confine themselves to the period before the action was commenced.[2] It is said that we cannot interfere with the verdict, upon the declarations of jurors in regard to their proceedings, but that the evidence should come *aliunde*. The Court are not disposed to disturb verdicts by making unnecessary inquiries, but where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found.[3] Here the principle upon which they proceeded was incorrect.

New trial granted.

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[1] See 1 Story's Comm. Eq. 289, 290; *Palmer* v. *Stebbins*, 3 Pick. (2nd ed.) 193, note 1, and cases there cited; *Alger* v. *Thacher*, decided in Suffolk, March term 1837; *Nobles* v. *Bates*, 7 Cowen, 307; *Pyke* v. *Thomas*, 4 Bibb, 486.

[2] See *Powers* v. *Ware*, 4 Pick. (2nd ed.) 107, note 1.

[3] See *Dorr* v. *Fenno*, 12 Pick. 526; *Parrott* v *Thacher*, 9 Pick. 426; *State* v *Hascall*, 6 N. Hampsh. R. 361; *Hix* v. *Drury*, 5 Pick. (2nd ed.) 302, note 1.

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STEPHEN GLOVER and GEORGE B. LAPHAM *versus* NATHANIEL AUSTIN.

In November, R, in contracting to build a ship for G, agrees to find all and do all in the carpenter's line, and to launch the ship and deliver her to G in September following, G stipulating to pay for her a certain price per ton in thirty days after the delivery; and in another instrument of the same date, R leases his ship-yard to G, and covenants, as soon as the keel shall be laid, to execute a bill of sale of the ship, before G shall be liable to make advances. G and one L, on the same day, agree that the ship is for their account and risk, and that they will sustain their respective proportions of profit and loss. On the 12th of May following, in consideration of advances made by G and to secure him against loss, R executes to him a conveyance of all the lumber and materials in the yard, and covenants to apply them to the building of the ship; but this instrument is made before the keel is laid. On the 20th of May, the keel being laid and the stem and stern posts raised, R, to secure the performance of the contract of November to build a ship, executes to G a conveyance of "the keel and other parts of an unfinished vessel, being the same vessel contracted to be built by the instrument of November," with a lease of the ship-yard, and makes a symbolical delivery; and the instrument contains a condition, that if G shall neglect to fulfil his part of the contract, the conveyance shall be void, and likewise a covenant by G, that R shall have free ingress into the yard to finish and launch the ship. *Held*, that these contracts were not fraudulent *per se*, nor unlawful; that the contract of May 12th was inoperative as a conveyance of the ship; but that by virtue of the contracts of November and of May 20th, the property in the keel vested in G, subject to the condition mentioned, and drew after it all the subsequent additions; and that an action of trespass against a sheriff who afterwards attached the ship on the stocks as the property of R, was rightly brought by G and L jointly.

TRESPASS against the defendant as sheriff of Middlesex, for taking and carrying away the hull of an unfinished ship. The defendant pleaded the general issue, which was joined; also a special plea, in justification, alleging that the ship, on the 12th of August, 1826, (the day on which she was taken,) was lying on the stocks in the ship-yard of Edward and Henry Rogers, shipbuilders and copartners, in Medford, and was their property, and not the property of the plaintiffs, and that one Emerson, a deputy of the defendant, by virtue of divers writs of attachment against E. & H Rogers, attached and took the ship as their property. The plaintiffs replied that the property in the ship, at the time of the attachment, was in themselves, and tendered an issue to the country, which was joined by the defendant.

At the trial, before *Wilde* J., the plaintiffs gave in evi-

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dence a contract under seal, dated November 10, 1825, between E. & H. Rogers and Glover, by which the Rogerses contracted to build for Glover a ship of the model and dimensions therein specified; *to find all and do all in the carpenter's line*; and to launch the ship and deliver her at a wharf in Boston, on or before September 1, 1826; and on the fulfilment of the contract, they were to be paid for every ton she should measure, 21 dollars and 75 cents, within thirty days after she should be delivered in Boston.

The plaintiffs also gave in evidence an instrument in writing, dated the same 10th day of November, signed by Glover and Lapham, by which it was agreed, that the ship was for account and risk of Glover, Lapham, and one Freeman, that Glover should have one half, and Lapham and Freeman one quarter each, and that they should sustain their respective proportions of profit and loss. This instrument was not signed by Freeman; who, being called as a witness, testified that he was a minor at the time, and that it was agreed between him and Glover, that he might take one quarter of the ship when she should be finished.

The plaintiffs proved that the copper and iron work, which were put into the ship, were fitted and prepared at the shop of Lapham, in Medford, he being a blacksmith, and were delivered by him to the Rogerses, but upon what terms and under what contract with Glover was not stated; except that H. Rogers testified, that Lapham told him he charged the iron work to Glover in the same manner as he did to Magoun, a shipbuilder at Medford. The value of the iron and copper put into the vessel was estimated at from 1300 to 1500 dollars.

The plaintiffs gave in evidence an instrument under seal between the Rogerses and Glover, dated the same 10th of November, whereby the Rogerses leased their ship-yard to Glover, and likewise covenanted to make to him, as soon as the keel of the ship should be laid, a conveyance or bill of sale of the ship, before he should be liable to make advances.

The plaintiffs then gave in evidence an instrument under seal, dated May 12, 1826, executed by the Rogerses and Glover, whereby, in consideration of one dollar paid and

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advances made by Glover, and to secure him against all loss, the Rogerses conveyed to him all the lumber and materials in their ship-yard. The instrument contained a lease of the yard, and a covenant of Glover to deliver up the same at the expiration of the lease, and a covenant of the Rogerses to apply the materials to the building of the ship.

The plaintiffs also gave in evidence a conveyance or bill of sale, under seal, dated May 20, 1826, from the Rogerses to Glover, in which the contract of November 10th, to build the ship, was recited, and by which the Rogerses, in consideration of one dollar and to secure the performance of that contract, conveyed to Glover the keel and other parts of the unfinished ship, then lying on the stocks. This instrument contained also a lease of the yard, and a condition, that if Glover should neglect or refuse to make his payments or to fulfil his part of the contract, the conveyance should be void; and Glover therein covenanted, that the Rogerses should have free ingress, egress, and regress, at all times during the term of the lease, into the demised premises, with their workmen, laborers and servants, and with their materials, for the purpose of working upon, completing, launching and removing the ship, so long as they should truly and faithfully proceed in the execution of their contract above mentioned, to build the ship.

The plaintiffs proved that Glover advanced, at divers times, a large sum of money, the first advance being 1000 dollars on the 29th of March, 1826, and the last, 500 dollars on the 1st of August, 1826. It appeared that the Rogerses did not apply the money so advanced, specifically to pay for the labor and materials upon and for the ship, but used it indiscriminately for that and other purposes, as their necessities required.

The defendant offered evidence to prove that the bill of sale of the 20th of May, as well as that of the 12th, and all the leases, were not known or made public, but were kept secret fraudulently by the Rogerses and Glover, and that a false credit was thereby given to the Rogerses, whereby their creditors were deceived, and all those who worked upon the ship, and who furnished materials for her, sustained a great loss.

212 It was testified on the part of the defendant, that more than

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one half, and on the part of the plaintiffs, that not more than one third of the materials worked into the ship at the time of the attachment, was brought into the yard after the 20th of May. It appeared that the Rogerses contracted in June 1826 to build a brig for Hall and Curtis, which was on the stocks at the time of the attachment, and was attached with the rest of the property; that they were in the habit of using the materials in the yard for the brig or the ship, just as it happened, indiscriminately, without regard to the circumstance of such materials having been in the yard or not, on the 12th of May; that they occasionally sold a single stick of timber from the yard when applied to for that purpose; and that the timber was thrown together promiscuously.

It appeared that the ship was of about 360 tons burden, and that it cost to finish her, after she was sold on the sheriff's sale, 2,775 dollars. It was testified, that nothing but the keel was laid and the stern and stem posts raised, on the 20th of May; that a few frames had been got out and brought together, but that none of them were raised at that time.

A few days afterwards H. Rogers gave Glover possession, by delivering to him a chip or piece of wood in the ship-yard, in the presence of one witness, and then most of the frames of the ship were up.

It was testified by J. Hunnewell, one of the defendant's deputies, that he saw Lapham several days after the commencement of this suit, and asked him why he had sued the sheriff, and Lapham replied that he had commenced no action and had no knowledge of any; that he had nothing to do with any suit or with the ship. The defendant produced a letter written to him by Glover, in which Glover says the ship is exclusively his property.

The jury were instructed, that the property in the unfinished ship was effectually transferred by the bill of sale, provided the same was *bonâ fide*, and that after the execution of it the ship was not, according to the legal construction and operation of that and the other instruments produced by the plaintiffs, liable to be attached as the property of the Rogers- 213
es; that the same rule applied to the whole of her, including

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that part which was constructed out of materials bought by them after the 20th of May.

The jury were likewise instructed to consider the action as rightly brought by Glover and Lapham jointly, and to find for the plaintiffs, unless they were satisfied that the transaction was infected with actual fraud, and that the making of the bill of sale was kept secret fraudulently and by design on the part of Glover.

The jury found for the plaintiffs. If in the opinion of the Court this action could not be sustained, or if any of the instructions to the jury were wrong, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

March 18*th*. *Hubbard* and *Morey*, for the defendant. Under the agreement of November 10th between the Rogerses and Glover, which was an absolute contract to build and deliver a ship of a particular description, but not a particular ship, the property would remain in the builders until the ship should be finished and delivered. *Mucklow* v. *Mangles*, 1 Taunt. 318; Chit. Contr. 112; Long on Sales, 168.[1] Glover, it is true, was to furnish the copper and iron work, but as the timber, which is the principal material, giving form to the ship, was to be furnished by the builders, the whole would belong to them by right of accession. 2 Kent's Comm. 294; Bract. *lib*. 2, *c*. 3, § 3, 4. Cases may be found where payments are made from time to time as the building proceeds, and the ship is transferred by instalments; but this case is different. Here the money was advanced without regard to the progress of the work. It was in fact a mere loan. Glover could not have been compelled to make the advances, and if he could, it would not alter the nature of the contract.

Then what is the effect of the subsequent deeds of the 12th and 20th of May? We contend that the first of them is wholly inoperative. There was no witness to it, no formal act of delivery, no notoriety. It was treated as a nullity by the Rogerses, and this was known to Glover. If it had no

214 operation, then the builders continued to furnish the materials for the ship. *Clow* v. *Woods*, 5 Serg. & Rawle, 282.

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1 See *Bonsey* v. *Amee*, 8 Pick. 237 238.

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On the 20th of May, Glover calls for a bill of sale of the keel and stem and stern posts; which shows that he did not consider himself entitled before to the unfinished ship. Supposing this conveyance to be valid, could that small part draw after it all the subsequent additions? But what is this instrument? It is not a contract of sale. It mentions no price, nor any estimate of value, and the consideration is merely nominal. It effected no change of risk; if the property had been afterwards consumed by fire, the loss would have fallen upon the builders. It contains no release of the contract of November 10th to build a ship and deliver her to Glover at Boston. On the contrary, it professes to be made to secure the performance of that contract; involving the absurdity of saying that a ship is sold to secure making the sale. Neither was this instrument a mortgage. It was not to be void on the performance of any thing by the supposed mortgager. It could not be defeated by him, but might by the supposed mortgagee. *Jones* v. *Smith*, 2 Ves. jun. 378; Metcalf's Yelv. 179; *Cortelyou* v. *Lansing*, 2 Caines's Cas. in Err. 202; *Badlam* v. *Tucker*, 1 Pick. 399; *Homes* v. *Crane*, 2 Pick. 611; Powell on Mortg. 3, 4. Nor was it a pledge; for that creates only a lien, and requires exclusive possession in the pledgee. There seems to be a lease, with a qualification that the lessors shall continue in possession of the demised premises. The lease has been entirely disregarded by both parties, so that there has not been such an exclusive possession as is requisite to preserve the lien. Should a sheriff, after attaching an unfinished ship, permit the owners to go on in this manner to finish it, his lien would be lost. 2 Pick. 610; Montag. on Lien, 4. This instrument then had no operation. It is an attempt to do what by law cannot be done. Glover undertook to be contractor for the vessel, and owner at the same time. He must be one or the other; he cannot be both.

Admitting that the attachment is ineffectual, still this action, being brought in the names of Glover and Lapham, cannot be sustained. If Lapham is properly made a party, Freeman ought not to have been omitted. But neither of them had any property in the ship. Lapham said he did not bring the action, and that he had nothing to do with the ship; and he

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charged the iron work to Glover; and Glover wrote to the defendant, that the ship belonged to himself exclusively. They cannot be permitted to go behind these declarations, and set up a joint title. The action therefore should have been brought in the name of Glover alone. *Stringer* v. *Murray*, 2 Barn. & Ald. 248.

Shaw and *Bartlett*, for the plaintiffs. The agreement of November 10th was a building contract and not a contract of sale, and no subsequent sale was necessary to vest the property of the ship in Glover. Where a chattel is constructed by a joint contribution of labor and materials, the agreement, if there is one, settles the ownership, and the person who is to own becomes a debtor to the other for his proportion of labor and materials. The copper and iron work found by Glover were inserted as into his own vessel. The delivery of the ship to him at Boston, was merely a part of the labor to be performed. It is said that Glover was not to pay for the ship until she should be so delivered. It is true he reserved that right, but he in fact made advances, and it was expected, and by one of the contracts of November 10th was implied, that he should do so. *Beaumont* v. *Crane*, 14 Mass. R. 400, *Flyn* v. *Matthews*, 1 Atk. 185; 1 Bell's Comm. 80, 101, note; *Woods* v. *Russell*, 5 Barn. & Ald. 942, and 1 Dowl. & Ryl. 587. In the case of *Merritt* v. *Johnson*, 7 Johns. R. 473, it was deemed an important circumstance, that the ship was built on land in the occupation of the carpenter; but the lease to Glover distinguishes the present case.

The bill of sale of May 12th vested in Glover all the materials in the ship-yard, and so the vessel was built with his materials. This instrument was effectual, although the articles intended to pass were not specified, nor any prices fixed since, as the articles were transferred only as collateral security, and were intended to be worked into the ship, the surplus would go to the Rogerses. It is said that part of these mate
216 rials was used upon another vessel; but it does not appear that the plaintiff knew of it, and if what was fit was inserted into his vessel, it was unimportant. It is further objected, that there was no change of possession; but the lease operated a change.

The conveyance made on the 20th of May was valid and

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sufficient. A bill of sale of the keel has immemorially been held to pass the vessel. 7 Johns. R. 473; 1 Bell's Comm. 102. The value of the accession compared with that of the chattel itself, does not affect the property. 3 Dane's Abr. 107. Besides, the accessions here were gradual, each one by itself being comparatively of small value. But the principle of accession is not applicable to the case. It applies only where the accessions are accidental or by mistake. Here the Rogerses by agreement put the materials into the plaintiffs' ship. Whether this last conveyance shall be called a sale, a mortgage or a pledge, is of no consequence. It was a conditional sale in pursuance of the original agreement and was founded on a sufficient consideration, and it vested in Glover a defeasible interest, which was to be absolute in case he should comply with his part of the contract, but otherwise was to be void. And as to the objection in respect to the lease, that the Rogerses continued to use the ship-yard as before, this was in pursuance of the express provisions of the lease, and for the purpose of accomplishing the general object of all these transactions. *Bissell* v. *Hopkins*, 3 Cowen, 166.

If this were an action against the Rogerses to enforce their contract, it should be in the name of Glover alone; but as it is against a trespasser, the only question is, whether Lapham was a joint owner of the property with Glover. They who own the property must join in the action. 2 Saund. 116*a*, note 2. If only one had brought the action, the defendant would be interested to see that one of two owners did not recover for the whole, lest he should be twice charged; but that difficulty will here be avoided, as both of the plaintiffs will be estopped by the judgment. *Sutton* v. *Buck*, 2 Taunt. 302. The contract between Glover and Lapham was a dormant partnership, and the property acquired by one belongs to both. *Leveck* v. *Shaftoe*, 2 Esp. R. 468. It was not a sale, 217
but a declaration of the proportions in which they were to be interested in the ship when it should come to either of them; and it was evidence of that, notwithstanding it was not signed by Freeman. Or Glover may be considered as having acquired a portion of the ship as the agent of Lapham, and the action may be in the name of the agent or of the principals

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In regard to Lapham's saying that he did not authorize the action, he knew he had signed the agreement, but whether he was a part owner of the ship was a question of construction; and as to the letter to the defendant, Glover intended merely to assert that the ship did not belong to the Rogerses. Whether the ship passed under the original contract or by the subsequent bill of sale, there being an agreement between Glover and Lapham that it should be their joint property, and they now asserting it to be so, a stranger shall not be allowed to turn them round on the point of a misjoinder, when to him it is immaterial who owns the ship, provided it does not belong to the Rogerses.

June 21st. PARKER J. C. delivered the opinion of the Court. The question in this case is, in whom was the property of the ship at the time of attachment by the defendant. If in Edward and Henry Rogers, the attachment will prevail; if in the plaintiffs, the defendant was a trespasser and the action is maintained.

The plaintiffs claim title to the ship by virtue of the several conveyances and contracts between Glover on the one part and E. & H. Rogers on the other, bearing date November 10, 1825, and a written agreement made the same day between Glover and Lapham relative to the contract first mentioned; also a contract between the two first named parties dated May 12, 1826, and another between the same parties made on the 20th of May.

The first instrument made on the 10th of November shows a contract for the building of a ship by the Rogerses for Glover. The former are to find all the carpenter's materials and do all the carpenter's work, to launch the ship and deliver her to
218 Glover in the month of September following; and he is to pay the stipulated price per ton in thirty days after such delivery.

The other instrument of the same date contains a lease of the yard in which the ship was intended to be built, and a covenant to convey the ship by bill of sale to Glover as soon as her keel should be laid, and before Glover should be required to make any payments on account of the ship.

It is obvious from these two instruments, that Glover was doubtful of the pecuniary circumstances of the Rogerses, and

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that expecting to advance money from time to time, as the work on the ship should proceed, though this was not provided for in the contract, it was the intention of both parties that he should have a lien on the ship for such advances.

The contract however was insufficient for this purpose, for by its legal effect the property in the ship would remain in the Rogerses until she should be delivered in Boston pursuant to its terms, and Glover had no security for the moneys he should advance, in the ship or the materials from which she was to be constructed.

Aware of this in all probability, an attempt was made to obtain the desired security by the instrument which bears date May 12th, but this perhaps was equally inoperative, notwithstanding Glover, as acknowledged in the instrument, had advanced a large sum of money on account of the ship; for at that time it does not appear that the ship was begun to be built, or that the materials were then selected and separated from great quantities of ship timber then in the yard, much more than would be required for the building of the ship; and there is no specification in the instrument, of the portions of timber which were to be appropriated as materials for this particular ship. Nothing more could pass by virtue of this instrument, than such sticks of timber or other materials as were then set apart and appropriated for the construction of the particular vessel which was the subject of their original contract.

But on the 20th of May there was something specific to convey, which was the subject of the instrument made on that day, and it is by virtue of this instrument, if at all, that the plaintiffs can support their title to the ship.

This instrument was intended to execute the covenant of 219
the Rogerses in one of the instruments of the 10th of November preceding, viz. "to make and execute to said Glover a good and sufficient conveyance and bill of sale of said vessel when the keel thereof shall be laid pursuant to the other instrument made on the same day;" and the question is, whether the purposes and intentions of the parties were lawful, and have been lawfully executed, so as to vest the ship then begun to be built, in Glover, so that its accruing form and value

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should be his, and not liable to the claims of the creditors of the Rogerses after that time.

That the purpose was lawful cannot be questioned, for it was to enable the artificer without funds to prosecute his labor with the funds of the merchant, and to give to the latter that security without which, according to all probability, the work would be stopped. Originally the contract might have been, that the merchant should find all the materials, and the artificer all the labor, in which case the property of the ship would be in the merchant; and under such a contract as the parties did enter into, there can be no doubt, that at any stage of the process it was competent to the parties to change their rela tion to each other, so that the merchant should become the owner, or should acquire a lien on the ship, or the materials from which she was to be composed, if done in good faith and in such form as will be recognised by the laws and rules of conveyancing.

The only grounds then which can be taken by creditors who see fit to attach, are to show that the means adopted to carry such intentions into effect are imperfect, or if perfect in form, that the transaction is fraudulent, being done with design to delay or defeat them of their just security under our attachment laws. Both these grounds have been taken on this occasion, and it is now to be decided with what success.

On the 20th of May, 1828, when the bill of sale was executed, the keel of the ship had been laid, and her stem and stern posts had been raised, and some frames had been got out and put together but not raised; but most of the timbers were up, a few days afterwards, when Glover took symbolical possession under his bill of sale.

220 There was a good and valuable consideration for the transfer, for Glover had advanced 1000 dollars in the March preceding, and had continued to make advances. The Rogerses were under covenant to make the transfer, and they had a perfect right to do it, there being no attachment or other lien on the property. The conveyance is "of the keel and other parts of an unfinished vessel, now lying on the stocks in the ship-yard of said E. & H. Rogers in Medford, being the same vessel contracted to be built by the instrument aforesaid," that

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is, the contract of November 10th. Between the parties such a conveyance was perfectly valid, and from that time every stick of timber that went into the ship, and all that was prepared to be put in, became the property of Glover.[1] The rule of the civil law mentioned in the argument will exactly apply to such a case, *proprietas totius navis carinæ causam sequitur*. As if the builder of a house, the frame of which has been raised, should sell the unfinished house, and then proceed to cover and finish it, the house when built, as between those two, would belong to the purchaser of the frame, and more especially if there had been an antecedent sale of the materials with which the house was to be built.[2] And such sale may be absolute or conditional, according to the real bargain between the parties.

It is obvious from the recital in this instrument, that this sale was intended only for security to Glover for the money advanced, and to be advanced. This intention is clearly expressed, and therefore the continuing of the Rogerses to work on the vessel without any new agreement as to the terms, is no evidence of any covert bargain different from that which is expressed. They considered the original contract still in force; the vessel was to be built, launched, delivered and paid for, according to the terms of it. But the property was changed, in order to give security, and this was innocent and proper.

Whether this instrument constituted a technical mortgage or not, it is immaterial to consider; it partook of the nature of a mortgage so far as related to the Rogerses' interest in the vessel beyond the advances of Glover, and of a conditional sale, 221
so far as related to the obligation of Glover to pay for her according to the original contract. Glover had the right of possession until the time of payment came, and then, if he paid, he had the absolute property; if he did not pay then, the deed was void, the property revested in the Rogerses. No are the rights of creditors impaired by such transactions, fo though they cannot by attachment take the vessel out of the

[1] See *Sumner* v. *Hamlet*, 12 Pick. 82, 83; *Johnson* v. *Hunt*, 11 Wendell, 135.
[2] See 2 Kent's Comm. (3d ed.) 361, 362.

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possession of such a vendee, they may, by virtue of the trustee process, secure in the hands of the vendee any balance which may be due to the vendor.

The instrument then is valid in itself; it is not *per se* fraudulent and void, and cannot be avoided but by the verdict of a jury, founded on the proof of a fraudulent intent towards creditors. This branch of the case has been settled by the proper forum, and therefore there is no occasion to consider the various facts reported which have a relation only to that question. The verdict on this point is not supposed to be against the evidence. The fact of not making a public declaration of a transaction of this kind has no tendency to prove fraud, and the evidence does not show any designed concealment.

With respect to the joining of Lapham in the action, we do not perceive any legal objection to it. Glover made all the contracts with the Rogerses; as to them he is the sole owner. But Lapham on the same day that the first contract was made, agreed to be an owner with Glover and Freeman in the proportion of one fourth. Glover has a right to consider him so, and it was not necessary that there should be a conveyance from the Rogerses to him to constitute him owner, sufficiently for the purpose of maintaining an action. The ownership of the vessel until she is registered may remain altogether in verbal engagements. If two or three agree to have a ship built, they will be presumed to be owners equally, unless some different proportion is agreed on. Lapham, by virtue of his contract with Glover, could claim and maintain his right to a quarter of the ship; and if Glover, by virtue of his conveyance from the Rogerses, should insist upon holding the whole,
222 a court of equity would compel him to convey. And although it was intended that Freeman also should be an owner, his failure to become so has no other effect than to make Glover the owner of three fourths, leaving one fourth to Lapham, according to his contract with Glover.

Judgment according to verdict

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STEPHEN GLOVER *et al. versus* JOSEPH HUNNEWELL.

Where R made a bill of sale to G of all the lumber and materials in a ship-yard for building and finishing a ship, without any schedule or specification of the articles, and without keeping them by themselves, it was *held*, that nothing passed by the conveyance; but taking such instrument in connexion with a former one by which R agreed to build a ship for G, and a subsequent one by which he conveyed to G the keel and other parts of an unfinished ship, then lying on the stocks, it was *held*, that all the timber which was actually selected and fitted for the ship would pass, if it could be identified.

A witness called for that purpose being unable to identify it, except by a schedule made some months after the sale, and even with that having no present recollection as to the articles enumerated, his testimony was rejected.

G having, immediately after he had made the contract with R for the building of the ship, agreed that L should be the owner of one quarter, it was *held* that L had no property in any of the timber before it was inserted into the ship.

TRESPASS against the defendant for taking and carrying away certain lumber and materials alleged to be parts of an unfinished ship. The defendant, as a deputy sheriff, on the 8th of August, 1826, attached these articles as belonging to Edward Rogers and Henry Rogers, and the question was, whether the property was in the plaintiffs (Glover and Lapham) at the time of the attachment.

At the trial, before *Wilde* J., the several instruments mentioned in the preceding case were given in evidence. The plaintiffs also offered to prove, that within a few days after the 20th of May, 1826, a delivery was made to Glover of the lumber and materials, and of the unfinished ship, and that a considerable portion of the materials claimed in this suit was at the time of the attachment, partly or wholly finished and fitted to be applied to the ship. And they showed that advances had been made to the Rogerses on account of the ship, 223
of 1000 dollars prior to the bill of sale of May 12th, and of 5,800 prior to the attachment.

To show that the materials and lumber claimed in the suit were in the ship-yard at the time of the execution of the bil of sale above mentioned, the plaintiffs produced a schedule, and offered to show by H. Rogers, that a day or two after the attachment the witness and Glover went into the yard with the view of identifying and distinguishing such part of the

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lumber and materials as were in the yard on the 12th of May and were comprehended in the bill of sale, and that the witness thereupon carefully selected the same, and Glover, in his presence, set down the same in writing, article by article; which schedule was produced and identified by the witness, but inasmuch as he said, that after the lapse of time which had occurred, he could not testify from his present recollection that the articles were in the yard on the 12th of May, and that the perusal of the schedule did not refresh his recollection, the judge refused to allow the schedule so identified to be read to the jury. The judge being also of opinion, that upon the evidence produced and offered to be produced by the plaintiffs, this action could not be maintained in the joint names of Glover and Lapham, a nonsuit was entered, with a view of reserving these questions for the consideration of the whole Court.

March 18th. *Shaw* and *Bartlett* contended that the materials for the ship passed to Glover by the terms of the contract, or if not, that they passed as appurtenant to the ship; and in either case, they became the joint property of the plaintiffs, Lapham being a dormant partner. *Woods* v. *Russell*, 5 Barn. & Ald. 942.

On the point that the evidence rejected was admissible, they cited *Union Bank* v. *Knapp*, 3 Pick. 96;[1] *State* v. *Rawls*, 2 Nott & M'Cord, 331.

Rand and *Morey*, *contrà*, cited *Clough* v. *Woods*, 5 Serg. & Rawle, 282: — *Mawman* v. *Gillett*, 2 Taunt. 326, note: *Lucas* v. *De La Cour*, 1 Maule & Selw. 249.

June 21st. PARKER C. J. delivered the opinion of the Court. In the case as it now stands there is no evidence of property, of the

224 chattels sued for, in the plaintiffs. Their claim is under an instrument dated the 12th of May, 1826, which purports to convey to Glover, one of the plaintiffs, all the materials in a shipyard then occupied by E. & H. Rogers: there is no schedule or specification of the articles which were intended to be passed under the terms, materials for building and finishing a ship. Taking this instrument in connexion with preceding ones of November 10, 1825, and the succeeding one of May 20,

[1] See 2nd ed. *p.* 109, note 1; *Shove* v. *Wiley*, decided in Essex, Nov. term 1836.

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1826, we have no doubt it would have passed all the timber and sticks which were actually selected and fitted for the vessel which by the first instrument was contracted to be built and by the last was transferred to Glover. But in order to give it effect, the plaintiffs should be able to show that the very sticks attached were the subjects of the transfer; which they have failed to do. The witness called for this purpose was not able to identify them, except by a schedule taken after the attachment, and even with that he was unable to swear with any certainty as to the identity of the sticks. We think his testimony was rightly rejected, and this is ground enough for the nonsuit to stand.[1]

Another question arose as to the proof of property (supposing the timber could have been identified) in Lapham, who is joined with Glover as plaintiff in the suit. By his contract with Glover he became part owner of the ship,[2] but he had no legal ownership of the timber from which she might be built. He was not a party to the transfer from the Rogerses, and therefore ought not to have been joined in the action.

Motion to take off the nonsuit overruled.

RICHARD H. AYER *versus* NATHANIEL AUSTIN. 225

Where in trespass *de bonis asportatis* the defendant pleaded the general issue, and filed a brief statement alleging that as an officer he attached the goods as the property of a stranger, it was *held* that the plaintiff was entitled to the opening and closing argument before the jury, notwithstanding the defendant admitted at the outset that the property was once in the plaintiff and assumed the burden of proving a transfer to such stranger.

TRESPASS against the sheriff of Middlesex for taking the plaintiff's timber.

The defendant pleaded the general issue, and filed a brief statement, wherein he averred that the timber was attached by one Hunnewell, his deputy, on divers writs against Edward

[1] See *Johnson* v. *Hunt*, 11 Wendell, 135.

[2] See *Glover* v. *Austin*, *ante*, 221, 222.

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and Henry Rogers, whose property at the time of the taking he alleged it to be, and so justified the taking, &c.

At the trial, before *Wilde* J., the counsel for the defendan admitted that the timber was once the property of the plaintiff, and that it still remained so, unless there had been a sale to the Rogerses. Upon this admission the defendant was called upon to make his defence, and his counsel contended, that as the burden of proof was thrown upon him by the admission, his counsel was entitled to begin and also to close the case; but the judge ruled that the plaintiff's counsel was entitled to the close.

Upon a motion for a new trial, *Rand*, for the defendant, said that whether one party or the other shall open and close, depends upon the question, on whom is the burden of proof at first. Here we admitted that the property in the timber was once in the plaintiff, the only thing which it was incumbent on him to prove at the outset, and assumed the burden of showing that he had parted with it. We should therefore have been permitted to open and close. This was not a privilege, depending on the discretion of the judge, but a matter of right *Davis* v. *Mason*, 4 Pick. 156; [see 2nd ed. 159, note 2;] *Goodtitle* v. *Braham*, 4 T. R. 497; *Jackson* v. *Hesketh*, 2 Stark. R. 518; *Hodges* v. *Holder*, 3 Campb. 366; *Doe* v. *Corbett*, ibid. 368.

Fletcher, for the plaintiff.

June 21st.

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Parker C. J. delivered the opinion of the Court. On the point raised in this case, which is matter of practice only, we are all clear that the course of argument prescribed at the trial was right. The general rule is, that the plaintiff, who has the burden of proof, shall have the general reply or closing argument. There has been an exception in our practice, only where the defendant by his plea admits the whole cause of action stated in the declaration, and undertakes to remove or defeat it by the matter set up in his bar. The cases have usually been trespass, where the defendant acknowledges the act, and claims in his plea the soil and freehold in himself, or some one under whom he acts as a servant or by license; — slander, in which a justification only is pleaded; — and debt on obligation, where the contract is admitted and

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some matter of defeasance or discharge is pleaded. There are other cases depending upon the same principle, that is, where, by the pleadings, nothing essential to the action is left for the plaintiff to prove, and where the finding of the issue for the defendant depends upon affirmative proof by him. In all such cases, however, if the defendant pleads the general issue also, the right of reply has been accorded to the plaintiff, even if on trial the defendant waives any proof on the part of the plaintiff to maintain that issue. This having been the uniform practice, according to the recollection of all of us, it is best to adhere to it, although in other cases, and in such as is before us, where the plaintiff was saved the trouble of proof to make out his case, by admission of the necessary facts, the reason may be quite as strong for giving this privilege to the defendant. The right of closing a cause is not very essential to the procurement of a right verdict, if the judge who presides is cautious in summing up the evidence. If, as in a neighbouring State, the court were mere silent spectators of forms without the right of charging the jury, the privilege of closing would be more worth contending for than with us, where the judge has the last word instead of the counsel.

Motion for new trial overruled.

SAMUEL D. PARKER *versus* JAMES DENNIE. 227

An officer having a joint execution against two whose several property he attached on the original writ, is not bound to levy equally, so far as may be practicable, on the property of each, but may levy on any of the property attached, without regard to a second attachment made by him at the suit of a creditor of one of the same defendants.

Where an officer unlawfully refuses to levy an execution upon money in his hands, the remedy is an action on the case, and not assumpsit for money had and received.

ASSUMPSIT for money had and received.

At the trial, before *Wilde* J., it appeared, that on the 16th of July, 1824, the defendant, as a deputy sheriff, by virtue of an original writ in the suit of Livermore and another against Herschell, Joseph and Myers, attached certain property belonging to Myers, and caused it to be sold by public auction,

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according to *St.* 1822, *c.* 93, and the net proceeds, amounting to 454 dollars, 26 cents, were held by him subject to the attachment. On the 19th of July he attached on the same writ a quantity of jewelry belonging to Joseph. On the same 16th of July the defendant again attached the property of Myers upon a writ in favor of J. T. Austin against Myers. On the 27th of December, 1824, he attached the same property of Myers and Joseph upon a writ in favor of Hickes & Arnold against Herschell, Joseph and Myers. On the 12th of March, 1825, he attached the same property of Joseph on a writ in favor of the plaintiff against Joseph. Livermore *et al.* recovered a judgment and took out execution against Herschell, Joseph and Myers for 1008 dollars, 39 cents, and on the 29th of March, 1825, the defendant, by order of the judgment creditors, levied the execution on the property attached belonging to Joseph, the net proceeds of which fell short of satisfying the execution by the sum of 335 dollars, 99 cents; and on the 3d of April he levied for this sum, upon the net proceeds of the property of Myers held by him under attachment. At April term 1825 of C. C. P., Austin recovered a judgment against Myers for 52 dollars, 26 cents, and
228 his execution for that sum was delivered to the defendant and satisfied. In the action of Hickes & Arnold a judgment was recovered at July term 1825 of C. C. P. for 220 dollars, 84 cents, against Myers only, and the residue of the proceeds of his property was applied by the defendant in part satisfaction of their execution. The plaintiff recovered a judgment against Joseph at October term 1825 of C. C. P. for 113 dollars, 45 cents, and delivered his execution to the defendant; which he returned in no part satisfied, stating the reason, that all the property attached on the original writ had been applied to the payment of the execution of Livermore *et al.*, their attachment being prior to the plaintiff's.

The plaintiff took an exception to the two executions in favor of Austin and Hickes & Arnold, and to the defendant's return upon them respectively, and contended that it did not appear that the defendant levied on the property of Myers within thirty days after the rendition of judgment, the return in each case being dated on the day on which the execution was

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returnable, *viz.* that upon Austin's execution being dated July 5, 1825, and that upon Hickes & Arnold's, October 4, 1825; the defendant beginning his return in each case with the words, "by virtue of this execution *I have applied* the net proceeds," &c. and concluding with the words, "and so *I return* the same," &c. Parker v. Dennie.

If these exceptions should be deemed material, or as having any bearing upon the question to be decided, the defendant was to be considered as having moved at the trial for leave to amend his returns. The defendant was likewise to have liberty to make any exception to the form of the action.

Upon the foregoing facts a nonsuit was ordered by consent, subject to the opinion of the whole Court.

Davis (Sol. Gen.), for the plaintiff, cited, in regard to the manner in which the property should have been applied on the executions, *St.* 1804, *c.* 83, § 6, and *Dennie* v. *Hamilton*, 16 Mass. R. 405; — and as to amending the return, *Williams* v. *Brackett*, 8 Mass. R. 240. *March 20th.*

Morey, *contrà*, cited on the first point *Herring* v. *Polley*, 8 Mass. R. 120; *Bellows* v. *Lovell*, 4 Pick. 155; *Harrington* v. *Ward*, 9 Mass. R. 251; — and to the point, that if the plaintiff was aggrieved, his action should have been in *case*, and not *assumpsit* for money had and received, 1 Chit. Pl. 137, 140; 2 Chit. Pl. 304; 3 Stark. Ev. 1350; 1 Backus's Sheriff, 288, 289. 229

Morton J. delivered the opinion of the Court. [After stating the case.] Upon these facts the plaintiff contends, that the defendant, having a joint execution against Herschell, Joseph and Myers, was bound by law to levy it, so far as practicable, equally upon the property of each; which would have left in his hands a balance of Joseph's property sufficient to satisfy the plaintiff's execution. *June 21st*

In a judgment against several where the joint property of the debtors, whether copartners or joint tenants, has been attached, as well as their several property, it would be the duty of the officer to levy upon the joint property, before he would have a right to take the several property of either to the prejudice of other attaching creditors. But in this case no joint property was attached, and the offi-

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cer was bound to satisfy the execution by the several property which he had attached. Was he bound to marshal the assets in his hands with reference to subsequent attachments, or had he a legal right, either by the direction of the judgment creditor or according to his own discretion, to levy the execution upon the property of either of the debtors?

The judgment was several as well as joint, and the execution ran against each for the whole debt, as well as against all of them.[1] Had there been no subsequent attachment, it cannot be doubted that the officer would have been justified in satisfying the debt from the property of either, as would be most convenient to himself or the judgment creditor, leaving the debtors to settle between themselves the proportion which each ought to contribute. Can the rights of the attaching creditor, or the duty of the officer, be affected by subsequent attachments?

The plaintiff contends, that the officer, being conusant of the after attachment, is bound to levy the execution upon the property of the debtors as nearly as practicable in equal
230 parts; but we are clearly of opinion that such is not the legal duty of the officer. He is to look to the face of his precept for his authority, and if it is not void, it will fully justify him in following its directions. He is not required to look beyond it, nor in any case to inquire into its origin.

It is true that in a joint judgment the legal presumption is, that the debtors owe the amount in equal parts. But should the officer look behind the judgment, he would oftentimes find, that, as between the debtors, equity would require that they should pay in unequal proportions, or that one should pay the whole, the one perhaps being merely a surety for the other. It would in many, if not in most cases, be inconvenient both to debtors and creditors, to require the officer, on the original writ, to make attachments of the property of all the debtors, when the debt might as well be secured by an attachment of the property of one of them, and even more inconvenient to require him on

[1] See Collyer on Partn. 472, 473.

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execution to make apportionment among several debtors and to sell several small parcels, where the debt might as well be satisfied by a single sale of sufficient property of one.

The same rule would require, where an equity of redemption was attached which could not be sold in parts, that the officer having sold it for enough to satisfy the whole debt, should seize and sell other property of the debtors, that a portion of the proceeds of the sale of the equity might be retained for subsequent attaching creditors or restored to the debtor.

The same principle, if well founded, must be applied to attachments of real estate, and would deprive the creditor of an election as to the estate to be levied upon, and compel him to accept several separate parcels instead of one. This would be inconsistent with the rights of the creditors, and by the increased expense impose an unjust burden upon the debtors.

The principle will appear still more objectionable when applied to cases which not unfrequently occur, where real estate of one debtor and personal estate of another, are attached. The creditor would be compelled to levy upon the real estate 231
of one and to seize the chattels of another, and thus be deprived of an option as to the manner of levying his execution, and as to the property upon which it is to be extended.

We think these considerations show very clearly, that the principle upon which the plaintiff relies would be inconvenient in practice, inconsistent with the rights of the first attaching cred itor, would be a restriction upon the authority of the officer irreconcilable with the express declaration of his precept, and not required by any provisions of law.

We are therefore of opinion, that the defendant, in applying the proceeds of the sale of the property of Joseph to the satisfaction of the first execution, whether acting by the direction of the creditor or from his own discretion, kept within the pale of his official duty.

Having seer that the defendant rightfully applied the property of Joseph to the payment of the first execution, it is immaterial to the plaintiff what disposition was made of Myers's property. The plaintiff had no lien on it, and whether Aus-

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tin's attachment was or was not dissolved, it is not necessary in this case to inquire. It may however be remarked, that at the time when the first execution was satisfied, the officer had no reason to suppose that any of the attachments would be dissolved by the negligence of the creditors or in any other way.

The form of the action was also objected to. The view which we have taken of the merits of this case renders it unnecessary to decide this question. But it will not be improper to state, that we think the action is misconceived. It is founded in tort and not in assumpsit. The gravamen of the plaintiff's complaint is, not that the defendant has got into his hands money which belongs to the plaintiff, but that he has wrongfully applied property in his hands to the satisfaction of another execution, which he ought to have applied to the plaintiff's. It is not a case in which the tort can be waived and assumpsit maintained. Had the defendant by a tortious act got into his hands money which in equity and good conscience belonged to the plaintiff, he might on this principle have maintained this
232 action. But the very wrong complained of is the disposal of money which he ought to have retained in his hands.

The motion to set aside the nonsuit is overruled.

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HENRY HALL *et al. versus* EDWARD WILLIAMS *et al.*

In an action of debt upon a judgment of a court of record of another of the United States *nul tiel record* is a proper plea; and the issue is to be tried by the court alone, so that the plea should conclude with a verification, and not to the country.

If the record of such judgment states that the defendant had notice of, or appeared in defence to the action, it seems that he cannot contradict it by the plea and issue to the country thereon; but if notice or appearance is not alleged in the record, he may avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court by which it was rendered.

Where in the record of such a judgment against W and F it appeared from the officer's return, that no process had been served on F, and that the plea was filed by one G as attorney to W, and the record did not allege that F had ever been within the State where the judgment was rendered, it was *held*, that a recital by the clerk before the entry of the judgment, stating that "W and F came by their said attorney," &c. could not be taken to be an assertion of record that F appeared to the action.

It was likewise *held*, that the plaintiff could not amend his declaration by striking out the name of F, for the judgment being entire, if it was a nullity with respect to one of the defendants, it was in the whole.

It *seems* that in an action of debt upon such a judgment, the defendant may, under a plea of *nil debet*, show that the court rendering the judgment had no jurisdiction over his person.

The allegation in a record, that the defendant appeared by his attorney, may in general be contested, no proof being ordinarily required of the authority to act as attorney.

THIS was an action of debt upon a judgment recovered against Williams and Fiske, the two defendants, in the Superior Court in Georgia.

The defendants plead,

1. *Nul tiel record*, concluding to the country; to which the plaintiffs demur, assigning for cause that the plea ought to conclude with a verification.

2. That neither of the defendants was served with process, or had notice of the original action, or appeared thereto, or authorized any person to appear for him.

3. That Fiske, one of the defendants, never was an inhab 233
ant of Georgia or resident therein, was never served with process, and never had notice of the original action nor appeared thereto.

To these two pleas the plaintiffs reply, that the defendants are estopped by the record in Georgia from denying

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notice, appearance, &c. On oyer prayed and granted, this record is set forth; whereupon the defendants demur to the replication.

4. *Nil debet*; to which the plaintiffs demur.

By the record it appeared, that the plaintiffs commenced a suit in Georgia, in May, 1824, against Williams and Fiske, as late copartners under the firm of E. Williams & Co. The officer's return, dated May 4, 1824, was as follows: — "I have served a copy on Edward Williams, Abijah Fiske not to be found in the county." The plea, filed July 15, 1824, was: — "And the said Edward Williams, by William W. Gordon *his* attorney, comes, &c. and saith that *he* did not undertake," &c. In another part the record states; — "Afterwards, to wit, on, &c. came the within named Henry Hall, &c. as well as the within named Edward Williams and Abijah Fiske within named by *their* attorney within named, and the jurors, &c. upon their oaths say, &c. Therefore it is considered that the said Henry Hall, &c. do recover against the said Edward Williams and Abijah Fiske the damages aforesaid by the jury aforesaid, in form aforesaid, assessed," &c.

March 20th. *Loring*, for the plaintiff, cited to the point that the plea of *nul tiel record* should conclude with a verification, and not to the country, Tidd's Pract. 620; *Collins* v. *Mathew*, 5 East, 473; Const. U. S. *art.* 4, § 1; Laws U. S. 1 *Cong.* 2 *Sess.* *c.* 11; *Brown* v. *Clark*, 3 Johns. R. 444; 1 Stark. Ev. 153, notes; also *Mills* v. *Duryee*, 7 Cranch, 481, — *Hampton* v. *M'Connel*, 3 Wheat. 234, — and *Commonwealth* v. *Green*, 17 Mass. R. 544, — in which it is held that no plea is good to an action of debt on a state judgment, which would not be admissible in the State where the judgment was rendered.

234 In regard to the conclusive effect of a judgment rendered in a court of another State, he cited *Mills* v. *Duryee*, *Hampton* v. *M'Connel*, and *Commonwealth* v. *Green*, *ubi supra*; *Green* v. *Sarmiento*, 1 Peters's Circ. Court Rep. 74; *Field* v. *Gibbs*, ibid. 153; *Andrews* v. *Montgomery*, 19 Johns. R. 162. The plea of want of notice and non-appearance is altogether inadmissible, and the only remedy of the defendants, if the judgment is erroneous, is to procure a reversal by writ of error. *Field* v. *Gibbs*, *ubi supra*; *Benton* v. *Burgot*, 10 Serg

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& Rawle, 240 ; *Shumway* v. *Stillman*, 4 Cowen, 292 ; Co. Lit. 260 *a* ; 2 Bac. Abr. 450, *Error*, *A* ; *Reed* v. *Jackson*, 1 East, 355 ; *Jackson* v. *Robbins*, 16 Johns. R. 537 ; Fitzh. N. B. 21 *I* ; Tidd, 1108 ; *Den* v. *Zellers*, 2 Halsted, 153 ; *Southgate* v. *Burnham*, 1 Greenl. 374 ; *M'Cormick* v. *Sullivant*, 10 Wheat. 192 ; *Richardson* v. *Walton*, 12 Johns. R. 434. Williams might have appeared for Fiske, and such appearance would have cured want of service of process, &c. *Harrison* v. *Jackson*, 7 T. R. 207 ; *Dwerryhouse* v. *Graham*, 3 Price, 266, note ; 1 Sellon's Pract. 100 ; *Martyn* v. *Skinner*, Barnes's Notes, (3d ed.) 239 ; *Wilson* v. *Finch*, ibid. 163 ; *Wade* v. *Wadman*, ibid. 167 ; *Hand* v. *Grosvenor* ibid. 424 ; *Wetherall* v. *Hawes*, ibid. 269.

As to the propriety of pleading *nil debet*, he referred to *Commonwealth* v. *Green*, *ubi supra*.

If the Court should be of opinion, that upon the face of the record the judgment is invalid, the plaintiffs move to amend their writ by striking out the name of Fiske, so that the action may proceed against Williams alone. *Bridge* v. *Austin*, 4 Mass. R. 115 ; *Colcord* v. *Swan*, 7 Mass. R. 291 ; *Woodward* v. *Newhall*, 1 Pick. 500.

W. H. Gardiner, for the defendants. Judgments rendered in another of the United States are not conclusive in all respects like domestic judgments ; but the question whether the court had jurisdiction over the cause and over the parties, is in all cases left open. The only doubt is as to the form in which the defendant shall set up the want of jurisdiction. *Bartlett* v. *Knight*, 1 Mass. R. 401 ; *Bissell* v. *Briggs*, 9 Mass. R. 462. These cases are not overruled by *Mills* v. *Duryee* and *Hampton* v. *M'Connel* ; which only settle the form of the 235
plea. See *Flower* v. *Parker*, 3 Mason, 251 ; *Commonwealth* v. *Green*, 17 Mass. R. 543 ; *Warren* v. *Flagg*, 2 Pick. 448 ; *Borden* v. *Fitch*, 15 Johns. R. 141, 144 ; *Andrews* v. *Montgomery*, 19 Johns. R. 164 ; *Shumway* v. *Stillman*, 4 Cowen, 292 ; 2 Kent's Comm. 91 ; 3 Wheat. 235, note *c* ; *Benton* v. *Burgot*, 10 Serg. & Rawle, 242 ; *Aldrich* v. *Kinney*, 4 Connect. R. 380 ; *Thurber* v. *Blackbourne*, 1 N. Hampsh. R. 242 : — all subsequent to one or both of the decisions in the Supreme Court of the United States. The

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general doctrine is maintained also in the following cases. *Kibbe* v. *Kibbe*, Kirby, 119 ; *Smith* v. *Rhoades*, 1 Day. 168 ; *Phelps* v. *Holker*, 1 Dallas, 261 ; *James* v. *Allen*, ibid. 188, 192 ; *Miller* v. *Hall*, ibid. 229 ; *Hitchcock* v. *Aicken*, 1 Caines's R. 460 ; *Kilburn* v. *Woodworth*, 5 Johns. R. 37 ; *Hubbell* v. *Coudrey*, ibid. 132 ; *Robinson* v. *Ward's Executors*, 8 Johns. R. 67 ; *Taylor* v. *Bryden*, ibid. 133 ; *Fenton* v. *Garlick*, ibid. 194 ; *Curtis* v. *Gibbs*, 1 Pennington, 399 ; *Rogers* v. *Coleman*, Hardin, 413; *Winchester* v. *Evans*, Cooke, 429 ; *Jacobs* v. *Hall*, 12 Mass. R. 25.

2. The plea of *nul tiel record* to debt on such a judgment, must conclude to the country ; for the question of jurisdiction is open on *the general issue* ; *Bissell* v. *Briggs*, 9 Mass. R. 462 ; and if *Mills* v. *Duryee* and *Hampton* v. *M'Connel* are conclusive upon this Court, *nil debet* is not, and *nul tiel record* is, the proper general issue. If there is no jurisdiction, there is no judgment, and consequently no record. In Pennsylvania it seems such defence can be shown only under *nul tiel record*. *Benton* v. *Burgot*, 10 Serg. & Rawle, 242. This depending on place of domicile, &c. is properly triable by the country. So is the *authentication* of the record, being open to questions of fact. This Court cannot judicially know the justices and clerks of the courts of the several States. *Ripley* v. *Warren*, 2 Pick. 596. The act of Congress does not require the *court* to judge of the authenticity of the record ; the *record itself* cannot be inspected, and an allegation of fraud or forgery may lead to an extended investigation of facts. The case before the Court is like that of an Irish judgment attempted to be enforced in England ; which by law is pleadable as a record, and
236 yet *nul tiel record* must conclude to the country. *Collins* v. *Mathew*, 5 East, 473 ; 4 Chit. Pl. 537. Debt lies on a mere foreign judgment, but the defendant cannot plead *nul tiel record*. *Walker* v. *Witter*, 1 Doug. 1.

3. The defendants are not estopped to deny, as in their second plea, what the record avers as to service, appearance, authority to appear, and such other allegations as belong to the question of jurisdiction over the person. *Aldrich* v. *Kinney*, 4 Connect. R. 380, and the other cases cited to the first point. That the attorney was not *authorized* to appear, may

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be shown even in a suit upon a domestic judgment; because it does not directly contradict the record. *Rider* v. *Alexander*, 1 Chipman, 267.

4. Admitting that the record cannot be denied, yet the defendants are not estopped by any thing in this record to plead, as in their third plea, want of notice to *Fiske* and no appearance for *him*; for from the whole record, which must be taken together, it is manifest that he did not have notice and did not appear. 3 Inst. 173; *Erdman* v. *Stahlnecker*, 12 Serg. & Rawle, 325; *Ward* v. *Johnson*, 13 Mass. R. 148; *Robertson* v. *Smith*, 18 Johns. R. 459.

5. If the defendants are not estopped upon the third plea, (*a fortiori* if not upon the second,) this judgment cannot be executed here, because it will charge one of the defendants without notice or means of defence, and who was not within the jurisdiction of the court in Georgia. Upon the cases before cited the judgment is illegal, erroneous and void. See also *Tappan* v. *Bruen*, 5 Mass. R. 196; *Gibbs* v. *Bryant*, 1 Pick. 121; *Richard* v. *Walton*, 12 Johns. R. 434; 4 Laws of Georgia, 12; *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173; 2 Bac. Abr. 501, *Error*, *M*; *Hawes* v. *Hathaway*, 14 Mass. R. 233.

6. If the defendants are estopped upon the second and third pleas, and the question of jurisdiction is not open on the plea of *nul tiel record*, then *nil debet* must be admissible. *Warren* v. *Flagg*, *Bissell* v. *Briggs*, and *Thurber* v. *Blackbourne*, before cited.

7. The plaintiffs cannot be allowed to amend by striking out the name of Fiske and to proceed against Williams alone, but they should have their judgment reversed and commence anew. *Richard* v. *Walton*, 12 Johns. R. 434; *Boaz* v *Heister*, 6 Serg. & Rawle, 18; *Curtis* v. *Patton*, ibid. 135; 2 Bac. Abr. 500, 503, *Error*, *M*; Com. Dig. *Pleader*, 3 *B* 20; *Swearingen* v. *Pendleton*, 4 Serg. & Rawle, 389; *Jones* v. *Raine*, 4 Randolph, 386; *Cole* v. *Pennell*, 2 Randolph, 174; *Munford* v. *Overseers &c.* ibid. 313; *Johnson* v. *Jebb*, 3 Burr. 1772; *Robertson* v. *Smith*, 18 Johns. R. 459. 237

PARKER C. J. delivered the opinion of the Court. In re- *June 21st*

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gard to the first plea, we are of opinion it is bad for the cause shown in the special demurrer. Whether there is a record or not, is generally to be tried by the court, and not the jury, for it is to be tried by inspection only, and the court are the proper judges whether what is shown for a record is one.

If the judgment declared on is of a foreign court, it is not treated as a record, and a plea of *nul tiel record* is not a proper plea; but under an issue to the country, all exceptions may be taken to what is produced as a record, and the judgment proved is only *primâ facie* evidence of debt.

Not so with domestic judgments, for the record of such being produced, they are conclusive evidence of debt, and there is nothing to submit to a jury, and whether there be such a record as is averred, can be known only by an examination of the book in which it is contained, or an exemplification in due form of law by those who have the custody and keeping of the same.

Now in this respect the judgment of a court of any of the United States is by the constitution and the law of Congress of 1790, put upon the footing of domestic judgments, for being duly authenticated as provided by the law, they are to have the same faith and credit given to them in every other State as they would have in the State where the judgment is rendered; so that upon inspection of the authenticated copy, the court to which it is presented are bound to examine it and pronounce judgment upon it in the same manner that they would upon a record of any court of their own State. *Mills* v. *Duryee*, 7 Cranch, 481.

238 The different manner in which the pleadings to a judgment of an Irish court, when declared on in England, have been viewed by the Court of King's Bench, is owing to the difference of legislation on the subject; for though it is provided by statute, that an action of debt shall be sustained on such a judgment, there is no legislative provision for the manner of authenticating the record, so that it is to be proved by witnesses like other facts, and therefore must be referred to the jury. *Collins* v. *Mathew*, 5 East, 473.

Under the second and third pleas, to which an estoppel by the record is pleaded, the question arises, so often and long

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agitated, whether the judgment of a court in another State is to all intents and purposes to be considered conclusive as a judgment rendered in a court of the State would be, so that nothing can be averred against it, or whether such a judgment is to some purposes open for examination and inquiry as to the grounds upon which it was rendered.

All agree, that until the adoption of the national constitution, the principles of the common law which are applicable in every country to judgments of the tribunals of foreign countries, were applicable to the judgments of the courts of the several States when sought to be enforced by the judiciary power of any State other than that in which they were rendered: that is, they were considered only as *primâ facie* evidence of debt, were to be declared upon, not as records, but as showing a consideration for a promise or debt, and a plea of *nul tiel record* was not a proper plea, but *non assumpsit* or *nil debet*, according to the form of the declaration.

This was definitively settled in England as the true character of foreign judgments, as early as the year 1778, and had long before been the received law of that country. *Walker* v. *Witter*, 1 Doug. 1.

Such was the law, before the revolution, in this and all the colonies and provinces, and so continued until the adoption of the national government, as appears by numerous decisions in the several State courts, which will hereafter be cited to another point; except that by the statute of 14 *Geo.* 3, *c.* 2, in Massachusetts, it was provided that an action of debt might be sustained on judgments of courts of the *neighbouring colonies*, 239
(alluding probably to the old league between the then New England provinces,) and that the records of those judgments, attested by the clerk of the courts rendering the same, should be good and sufficient evidence. And the statute of the Commonwealth of 1795, *c.* 61, placed the judgments of courts of all the United States on the same footing on which they were intended to be placed by the constitution of the United States; an act of legislation which was quite unnecessary after the act of Congress of 1790 before referred to. Under these provisions the judgments of sister States are no longer to be considered as mere foreign judgments, to be proved like other

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facts by testimony to the jury; but are to be treated altogether as domestic judgments in regard to the proof of their existence, and therefore the issue on a plea of *nul tiel record* is to be tried by the court only, so that such a plea concluding to the country is undoubtedly bad, as before stated.

But in regard to the conclusiveness of such judgments to all intents and purposes, there is yet a question of considerable importance, which has been discussed and decided in almost every State in the union in which there are printed reports of their judicial decisions; and the question is presented now by the issue taken on the second and third pleas to this action. The defendants, in answer to the declaration, say that neither of them was served with notice of the suit in which the judgment was rendered, nor appeared or authorized any one to appear for him in the action, and that Fiske was never an inhabitant of, or resident in the State of Georgia. The plaintiffs reply that the defendants are estopped by the record to deny these facts, and the record being set forth on oyer, the defendants demur to the replication of estoppel. If it appeared by the record that the defendants had notice of the suit, or that they appeared in defence, we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true, judicially; and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the
240 authorities where the judgment was rendered, for redress, for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process, or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles, that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defence.

It cannot be pretended, we think, that a citizen of Massachusetts, against whom a judgment may have been rendered in Illinois or Missouri, he never having been within a thousand miles of those States, should be compelled by our courts to execute that judgment, it not appearing by the record that he

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received any manner of notice that any suit was pending there against him, and being ready to show that he never had any dealings with the party who has obtained the judgment; and yet this must be the consequence, if the doctrine contended for by some is carried to its full length, *viz.* that the record of a judgment is to have exactly the same effect here as it would have in Illinois or Missouri; for in those States, if the process has been served according to their laws, which may be in a manner quite consistent with an utter ignorance of the suit by the party without the State, the judgment would be binding there until reversed by some proceedings recognised by their laws.

If it be said that a party thus aggrieved may obtain redress by writ of error, or a new trial, in the State where the judgment was rendered, it is a sufficient answer, that never having been within their jurisdiction or amenable to their laws, he shall not be compelled to go from home to a distant State, to protect himself from a judgment, which never, according to universal principles of justice, had any legal operation against him.

The laws of a State do not operate, except upon its own citizens, *extra territorium*; nor does a decree or judgment of its judicial tribunals, except so far as is allowed by comity, or required by the constitution of the United States; and neither of these can be held to sanction so unjust a principle. If the 241
States were merely foreign to each other, we have seen that a judgment in one would not be received in another as a record, but merely as evidence of debt, controvertible by the party sued upon it. By the constitution, such a judgment is to have the same effect it would have in the State where it was rendered; that is, it is to conclude as to every thing over which the court which rendered it had jurisdiction. If the property of a citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive. If the citizen himself is there and served with process, he is bound to appear and make his defence, or submit to the consequences; but if never there, there is no jurisdiction over his person, and a judgment cannot follow him beyond the territories of the State, and if it does, he may treat it

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as a nullity, and the courts here will so treat it, when it is made to appear in a legal way that he was never a proper subject of the adjudication. These principles were settled in a most lucid and satisfactory course of reasoning by Chief Justice *Parsons*, in the opinion of the Court delivered by him in the case of *Bissell* v. *Briggs*, 9 Mass. R. 462. This exposition of the constitutional provision respecting the records and judicial proceedings, authenticated as the act of Congress requires, takes a middle ground between the doctrine as held by the Court of this State in the case of *Bartlett* v. *Knight*, 1 Mass. R. 401, and by the court of New York in the case of *Hitchcock et al* v. *Aicken*, 1 Caines's R. 460, in both of which it was held that the constitution and act of Congress had produced no other effect than to establish definitively the mode of authentication, leaving in other respects such judgments entirely upon the footing of foreign judgments according to the principles of the common law. But in the case of *Bissel* v. *Briggs*, the principle settled is, that by virtue of the provision of the constitution and the act of legislation under it, a judg ment of another State is rendered in all respects like domestic judgments, when the court where it was recovered had jurisdiction over the subject acted upon and the person against whom it was rendered, leaving open for inquiry in the court
242 where it was sought to be enforced the question of jurisdiction, and taking the obvious distinction between the effect of the judgment upon *property* within the territory, and the *person* who was without it. It was thought that this was carrying the sanctity of judgments of other States as far as was consistent with the safety of the citizen who was not amenable to their laws, and as far as is required by the spirit or letter of the constitution of the United States.

The doctrine thus established here has been approved and adopted by the courts of the great States of Pennsylvania and New York, in both of which before it had been held, that the judgments of the several States were to be treated as foreign judgments. The case of *Borden* v. *Fitch*, 15 Johns. Rep. 121, is full to this point, and was after the publication of the case of *Mills* v. *Duryee*, determined in the Supreme Court of the United States, 7 Cranch, 481, hereafter to be noticed

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In this case the opinion of Chief Justice *Parsons* in the case of *Bissell* v. *Briggs* is spoken of as putting the question upon a sound principle; and so also in the case of *Benton* v. *Burgot*, 10 Serg. & Rawle, 242, in Pennsylvania, where the same doctrine is laid down in the opinion of the court delivered by Mr. Justice *Duncan*.

The principle upon which this exception is made to the conclusiveness in every particular, of the judgments of other States, is well expressed by Mr. Justice *Johnson*, of the Supreme Court of the United States, when dissenting from the decision of the court in the case of *Mills* v. *Duryee*. He says it is an eternal principle of justice, "that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits."

Indeed, so palpable is this principle, that no doubt could exist in the mind of any lawyer upon the subject, but for the construction supposed to be given to the constitution of the United States, and the act of Congress following it, in the case of *Mills* v. *Duryee*, 7 Cranch, 481, and re-sanctioned in the case of *Hampton* v. *M'Connel*, 3 Wheat. 234, in the brief opinion delivered by Chief Justice *Marshall*. This construction, when first referred to in this Court in the case of the *Commonwealth* v. *Green*, was supposed to have put an end to all questions on this subject, and to have established as the law of the land, that a judgment recovered in one State by a citizen thereof against a citizen of another, was absolute and incontrovertible, and would admit of no inquiry even as to the jurisdiction of the court which rendered it. This Court yielded a painful deference to the decision, without that close examination it would have received if presented to them otherwise than incidentally, and if its bearing had been of importance in the case then before the Court; but the notice taken of the case was merely the expression of an opinion *arguendo*, and not a judicial determination of the question. And as a further reason for not receiving the doctrine implicitly as authority, it may be remarked, that the case to which it was applied was one clearly within the jurisdiction of the court which de-

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cided it, so that the point now raised was not brought into question.

This is not the first occasion we have had to regret a too prompt submission to the decision of the Supreme Court of the United States; not however from any diminution of entire respect for that eminent tribunal, but because we have found that further consideration has brought about a qualification of the doctrine which seemed to have been definitively settled, or that some qualifying principle in the case itself has been overlooked by us, in our readiness to yield supremacy to that court on all questions in which by the constitution their judgment is paramount. I allude to the decisions of that court on State insolvent laws, in the case of *Sturgis* v. *Crowninshield*, 4 Wheat. 122, the effect of which we understood to be, to overrule the decision of this Court in the case of *Blanchard* v. *Russell*; in consequence of which we dismissed several cases which might have been maintained on the grounds of that decision. We have since learned by the case of *Ogden* v. *Saunders*, 12 Wheat. 213, that there is no decision of the Supreme Court of the United States militating with our decision, and feel ourselves justified in recurring to the principle there decided as the law of this Commonwealth.

244 The case of *Mills* v. *Duryee* has, as its importance merited, undergone a revision in almost every State court in the Union, of whose decisions we have any printed account; and the opinion has been unanimous, without the dissenting voice, so far as we can learn, of a single judge, that that case, however unqualified it may appear in the report, does not warrant the conclusion, that judgments of State courts are in all respects the same when carried into another State to be enforced, as they are in the State wherein they are rendered, but that in all instances, the jurisdiction of the court rendering the judgment may be inquired into. In truth, all of them sanctioning the principles, and some of them by express reference, which were asserted by this Court in the case of *Bissell* v. *Briggs*, as the only just exposition of the provision in the constitution of the United States in relation to the records and judicial proceedings of States.

In the State of Maine it does not appear that their courts,

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since the separation, have been called to consider the question.[1]

In New Hampshire there is a most express limitation of the effect of such judgments, similar to the case of *Bissell* v. *Briggs*: the opinion being delivered by *Bell* J., now a senator of that State in Congress, and concurred in by *Woodbury* J., holding the same situation. *Thurber* v. *Blackbourne*, 1 New Hampsh. R. 246.[2]

In Connecticut the same doctrine was held and ably enforced by Chief Justice *Hosmer*, in the opinion of the whole Court as delivered by him. *Aldrich* v. *Kinney*, 4 Connect. R. 380.

In New York and Pennsylvania the cases before cited maintain the same doctrine; also *Shumway* v. *Stillman*, 4 Cowen, 292.

In New Jersey it was decided that the judgment of a State court is conclusive under the constitution and laws of the United States, between the parties, both parties being in court and a defence made or opportunity had to make it, not otherwise. *Curtis* v. *Gibbs*, Pennington, 405.

In Kentucky, if the judgment of a State court be founded 245
on the appearance of the defendant or the actual service of process on his person, the judgment is conclusive, except when it might be impeached in the courts of the State where it is given. But where the defendant did not appear and had constructive notice only, (as by attachment or publication,) it is not conclusive, but may be inquired into and impeached. *Rogers* v. *Coleman*, Hardin, 413.[1] The opinion delivered

[1] In *Adams* v. *Rowe*, 2 Fairfield, 95, it is said that the case of *Bissell* v. *Briggs*, "has ever been considered in the State of Maine, as reposing on the soundest principles and sustained by unanswerable arguments." See also *Hall* v. *Williams*, 1 Fairfield, 278; *Harding* v. *Alden*, 9 Greenl. 149, 150.

[2] See *Whittier* v. *Wendell*, 7 N. Hampsh. R. 257.

[1] The same doctrine is held in Ohio; *Spencer* v. *Brockway*, 1 Ohio R. 260. See also *Goodrich* v. *Jenkins*, 6 Ohio R. 43

For the manner in which this subject is treated in South Carolina, see *Miller* v. *Miller*, 1 Bailey, 242.

In Maryland, see *Wernway* v. *Pawling*, 5 Gill & Johns. 500.

In Tennessee, see *Hodge* v. *Deaderick*, 1 Yerger, 125; *Stegal* v. *Wyche*, 5 Yerger, 83.

In Illinois it is said, that "a judgment from a sister State, is conclusive ev-

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by Mr. Justice *Trimble*, now of the Supreme Court of the United States, is very full and able, and puts the conclusiveness of the judgment altogether upon the fact of the party's having had an opportunity to defend himself.

With such a cloud of witnesses in favor of the construction given to the clause of the constitution which is in question, by this Court in the case of *Bissell* v. *Briggs*, we may well rest upon that as the true construction, if it is not the most clearly and explicitly overruled by the only tribunal whose authority ought to be submitted to, the Supreme Court of the United States. But notwithstanding all these decisions, many of which are subsequent in point of time to the case of *Mills* v *Duryee*, and most of them commenting on it, we should be bound to give up the point, if that case settles the question as conclusively as it has been supposed it did.

But all the State judges who have considered that case, are of opinion that it was intended only to embrace judgments where the defendant had been a party to the suit by an actual appearance and defence, or at least by having been duly served with process when within the jurisdiction of the court which gave it; and they formed their opinion upon the following clause in the opinion of Mr. Justice *Story*, *viz.* "In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that State."[2] If this is all that was intend-

idence of the debt claimed; it imports absolute verity and nothing can be averred against it; — unless, perhaps, in cases where from the record and proceedings it should appear that the party had no notice." *Rust* v. *Frothingham*, 1 Breese, 259. A plea to an action of debt on such a judgment, "that the defendant had not been served with process, had never appeared, or authorized an attorney to appear for him," is good, unless the record show the contrary. The record cannot be contradicted by evidence. Ibid.

[2] In Story's Comm. Confl. Laws, 509, it is said, that although by the constitution of the United States, *art.* 3, § 4, and Act of Congress of 26th May, 1790, *c.* 11, the judgments of the State courts are put upon the same footing in other States as domestic judgments, "yet this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, to pronounce the judgments, or into the right of the State to exercise authority over the parties on the subject matter. The constitution did not mean to confer any new power upon the States; but simply to regulate the effect of their acknowledged jurisdiction over persons and things

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ed to be decided, the case harmonizes with the general course of decisions in the State courts as before cited, and it is in no respect different from the decision of this Court in the case of *Bissell* v. *Briggs*.

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In a slight examination of the case made by us when considering the case of *Commonwealth* v. *Green*, we supposed the decision to be more extensive, and felt bound to yield to it in a collateral question not essential to a determination of the cause then before the Court; but having the general question now brought distinctly before us, we fully concur with the numerous learned judges who have given the restricted construction as above stated, to the decision of the case of *Mills* v. *Duryee*.

We therefore are all of opinion, that the record of a judgment of a court of another State is not conclusive evidence, but that to the extent stated in the case of *Bissell* v. *Briggs* it is examinable, in order to ascertain whether the party against whom it is produced was subject to the judicial process on which it is grounded; and that where it appears by the record itself that there was no appearance, and no notice which he was bound to attend to, the judgment against him is a dead letter beyond the territory within which it was pronounced. [1]

Upon inspecting the record produced in support of this action, we find by the return of the officer who was charged with the duty of serving the process, that no notice of the suit was given to Fiske, one of the defendants, nor is it anywhere averred in the proceedings that he was an inhabitant of, or had ever been resident in the State of Georgia. The appearance by the attorney is for Williams alone, who had been duly served with process, and his plea to the action is filed for Williams

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within their territory." See Story's Comm. on the Constit. c. 29, § 1297 to 1307.

[1] See *Whittier* v. *Wendell*, 7 N. Hampsh. R. 257; Story's Confl. Laws, 492 *et seq.*, 459 *et seq.*, 509, and cases cited in the notes; *Hall* v. *Williams*, 1 Fairfield, 283 to 287; *Warren* v. *Flagg*, 2 Pick. (2nd ed.) 448, note 1, and cases there cited; *Adams* v. *Rowe*, 2 Fairfield, 94, 95; *Borden* v. *Fitch*, 15 Johns R. (2nd ed.) 121, note *a*; *Healey* v. *Root*, 11 Pick. 390; *M'Rea* v. *Mattoon*, 13 Pick. 58; *Woodward* v. *Tremere*, *post*, 354; *Bradshaw* v. *Heath*, 13 Wendell, 407; *Newell* v. *Newton*, 10 Pick. 472.

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alone. Afterwards in the recital by the clerk before the record of the judgment, it is stated that the same attorney appeared for Fiske as well as Williams, but as this is mere recital founded upon the prior proceedings, this cannot be taken to be an assertion of record that Fiske appeared by attorney, for it appears by the same record that the attorney appeared for Williams only, and there is no plea filed but for Williams. There is nothing therefore in the record which is contradicted by the second and third pleas, and the replication by estoppel is therefore bad and the plea good; which settles the case in favor of the defendants, unless the judgment can be
247 sustained against Williams alone, and this writ can be amended by striking out Fiske;[1] but such an amendment would not help the case, for the judgment being entire, if it is a nullity with respect to one, it is also in the whole.[2] *Richard* v. *Walton*, 12 Johns. R. 434.

Whether the facts stated in the second and third pleas might be shown in evidence on an issue to a plea of *nil debet*, it is immaterial to consider. But such was the plea in the case of *Bissell* v. *Briggs*, and there was no objection to the form, and *Parsons* C. J. says, "Such judgments," meaning the judgments of courts in other States, "may be declared on as evidences of debts or promises, and on the general issue the jurisdiction of the courts rendering them is put in issue; but not the merits of the judgments." And in New Hampshire, in the case before cited, it is expressly decided that the plea of *nil debet* is proper for the above purpose. In the other States, generally the question has been raised by a special plea in the form of the second and third pleas in this action. We are

[1] After this decision, the same court in which the judgment against Williams and Fiske was originally rendered, on motion of the plaintiff's counsel permitted an amendment of the record, by striking out the name of Fiske, and entering up judgment *nunc pro tunc* against Williams alone. This was done after notice to the attorney who had been originally employed in the action by Williams, Williams himself having some years before left the State and never having returned. An action was brought on the *amended* judgment in the State of Maine, and the court there held, that they were bound by the constitution of the United States to give "full faith and credit" to the record. *Hall* v. *Williams*, 1 Fairfield, 278.

[2] See *Starbuck* v. *Murray*, 5 Wendell, 162, 163.

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inclined to the opinion, that the plea of *nil debet* may be so used,[3] and that on an issue formed on that plea, if it appear that the court rendering the judgment had jurisdiction, the record is conclusive evidence of the debt,[4] that is, if it appears affirmatively that the defendant was duly served with process within the State, or actually appeared and defended the suit, or appeared by attorney duly authorized; which latter fact we think may be contested, as was allowed in the case of *Aldrich* v. *Kinney*, 4 Connect. R. 380, the record being only *primâ facie* evidence of that fact, because no proof is ordinarily required of authority to act as attorneys.

If it appear by the record that there was no jurisdiction over the person, the judgment is a nullity, not to be received as *primâ facie* evidence, and the plaintiff must resort to other counts to support his action, or fail.

The full faith and credit required to be given in each State to the judicial proceedings of other States, will prevent any evidence to contradict the facts which show a jurisdiction, if such appear on the record.[5]

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[3] As to this plea, see *Warren* v. *Flagg*, 2 Pick. (2d ed.) 448, note 1 and the cases there cited; *Chipps* v. *Yancey*, 1 Breese, 2; *Kimmell* v. *Shultz*, 1 Breese, 128.

[4] See *Starbuck* v. *Murray*, 5 Wendell, 158.

[5] But see *Starbuck* v. *Murray*, 5 Wendell, 148; *Holbrook* v. *Murray* 5 Wendell, 161; *Shumway* v. *Stillman*, 6 Wendell, 447; *Warren* v. *Flagg*, 2 Pick. (2nd ed.) 448, note 1.

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BENJAMIN T. PICKMAN *versus* SAMUEL WOODS.

The owner of a brig, by an instrument under seal, chartered her to one L from Boston to South America and back to Boston. He covenanted to keep her in good condition, to victual and man her, and that L should load her at Boston and at Rio Grande with such goods as he should think proper, contraband excepted, and should appoint the master: in consideration of which, L covenanted to pay him in full for the freight or hire of the brig 600 dollars per month in 30 days after her return to Boston. The brig sailed with a master appointed by L, and a cargo belonging to him, which was assigned during the voyage. At Rio Grande the proceeds of the outward cargo were invested in a return cargo, the bill of lading stating that the same was to be delivered to L or his assigns, at New York or Boston, he or they paying freight for the same, and that the brig was bound to New York. Upon her arrival at New York the owner took possession of her and refused to deliver the cargo, claiming to retain it for freight. It was *held* that he had no lien on the cargo for freight, but that his only remedy was upon the personal covenant of L in the charter-party; and that the instrument did not cease to be binding on him by reason of the vessel's going to New York, so as to give him a right to take possession of her there and by that means acquire a right to freight on the merchandise on board.

THE facts in this case and the points argued, are sufficiently stated in the opinion of the Court. Besides several of the authorities there cited, *Shaw* and *Bartlett*, for the plaintiff, referred to *Birley* v. *Gladstone*, 3 Maule & Selw. 205; *Vallejo* v. *Wheeler*, Cowp. 143; *S. C.* Lofft, 631; *Hutton* v. *Bragg*, 7 Taunt. 14; *Trinity-House* v. *Clark*, 4 Maule & Selw. 288; — and *S. D. Parker*, for the defendant, to *Cock* v. *Taylor*, 13 East, 399, and 2 Campb. 587; Abbott (3d ed.) 277; *Moorsom* v. *Kymer*, 2 Maule & Selw. 318.

March 21st.

June 21st.

PARKER C. J. delivered the opinion of the Court. This is an action of replevin for certain ox horns. The case finds that these horns are part of the proceeds of a cargo, shipped by Edward Lander on board the brig Holly, owned by the defendant but chartered to Lander by an instrument under seal, dated June 3, 1826, by which instrument the brig is let to freight to Lander from Boston to the east coast of South America and back to Boston. The defendant covenanted in the charter-party to put and keep the brig in good condition for and during the voyage, to victual and man her, and that Lander should load her at Boston and at Rio Grande with such
219 goods and merchandise as he should think proper, contraband

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goods excepted, and should appoint the master of the brig. In consideration of which, Lander covenanted to pay the defendant or his order, in full for the freight or hire of the brig and appurtenances, six hundred dollars per month, commencing from the date; and so in proportion for a less time as the brig should be continued in the service mentioned, *in thirty days after her return to Boston*. And there are further covenants respecting the purchase of the vessel, which are not material to the question before us.

The vessel, soon after the execution of this instrument, sailed on the voyage described therein, with a master on board appointed by Lander, and a cargo wholly the property of Lander.

On the 11th of July following, Lander, for a valuable consideration, assigned the cargo to the plaintiff, and indorsed to him the bill of lading and invoice thereof, and also two policies of assurance which he had caused to be effected thereon; of which notice was sent on to Brace, the master of the brig, which reached him at Rio Grande, but not until after the vessel had sailed from thence on her return to the United States; Brace having remained there to dispose of some of the cargo, and having put in as master one Clark, to whom he gave verbal orders to proceed to New York, and there, after delivering the freight taken for that place, to await the orders of the defendant or Lander. On receiving from the plaintiff notice of the assignment of the cargo to him by Lander, after the sailing of the brig, Brace stated an account with the plaintiff, in which he credited him with the proceeds of the outward cargo and debited him, among other things, with the horns. Clark executed a bill of lading in common form, which expressed that the goods shipped were to be delivered to Lander or his order or assigns, he or they paying freight for the same, but without stating any sum or rate of freight. This bill of lading states that the brig is bound for New York, and that the goods are to be delivered at New York or Boston.

The brig arrived at New York about the 7th of February, 1827, with the horns and a quantity of hair and hides on board shipped for Lander, and also property taken on freight for W. Whitlock & Co., a mercantile house ir New York, the 250

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freight of which amounted to 1014 dollars. This sum has been paid to Clark, and is claimed by the defendant; but his claim is contested and a suit is pending therefor. It does not therefore come in question in the present suit. Who contests the defendant's right to receive it of Clark, does not appear; if the present plaintiff, he certainly has no pretence, under his assignment of the cargo, to claim freight for other goods.

Before the arrival of the vessel at New York, Lander failed and became insolvent, and the defendant has no adequate security for the money due on the charter-party, except the lien which he claims to have on the horns and other property imported in the brig. The plaintiff demanded the hides, hair and horns, without tendering any thing for freight, insisting that he was not liable therefor. The defendant refused to deliver the property, and instructed the master to retain the same for the freight. The defendant took possession of the vessel before the discharge of her cargo at New York, and appointed Clark to continue master under him.

Upon this state of facts two questions have been raised: — 1. Whether the defendant had a lien upon the goods shipped on board the vessel by Lander, for the hire of the vessel, in virtue of the contract subsisting between them, so that the goods passed to the plaintiff by the assignment, subject to such lien; — 2. If not, whether in consequence of the vessel's going to New York without necessity, to carry freight there, the charter-party ceased to be binding upon the defendant, so that he had a right to take possession of the vessel there, and by that means acquired a right to freight on such merchandise as he found on board thereof.

In regard to the first question, it seems quite clear, from an examination of many authorities, that from the nature of the contract of charter-party which was entered into between the defendant and Lander, the former had no lien upon the goods imported, but that his only security was personal against Lander according to the covenants in the instrument.

25: The general doctrine on the subject is thus stated by Lawes, in his treatise on charter-parties, *p.* 202. "The lading of the ship, in construction of law, is tacitly bound for freight, which is, in point of payment, preferred to any other

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debts to which the goods are liable; for the goods remain, as it were, bailed or pledged as a security for the freight; but by special contract, this right may be dispensed with." So in Molloy, *bk.* 2, *c.* 4, § 12; and he adds, that goods thus subject to freight are not attachable to the prejudice of the owner of the vessel. So also in Beawes' Lex Mercatoria, *tit. Freight.* And in 3 Chitty on Com. & Man. 417, it is stated, that "the time and manner of payment of freight are frequently regulated by express stipulations in a charter-party, or other written contract; and when that is the case, the payment must be according to such stipulations; but if there be no express stipulation to the contrary, or inconsistent with the right of lien, the goods conveyed generally remain as a security until the freight is paid," &c. 1 Doug. 104, — Abbott (4th ed.) 258, — and 4 Barn. & Ald. 50, are cited in support of this proposition. Chitty, in the next page (418), proceeds: — "In some cases this right of lien cannot arise, as where the owner of the vessel, by charter-party or other contract, parts with the possession of the vessel, or, in other words, demises the ship to the owner of the cargo for the time of the hiring. It depends on the intention of the parties and the words of the instrument."

There are several cases in the English books where this question of lien has been discussed, and although they are not all perfectly consistent with each other, they all admit the general doctrine, with the qualification as stated in Lawes and Chitty above cited. Most of them turned upon the question whether the owners of the ship had entirely parted with the possession, because, if they had, it was difficult to maintain a lien, which, according to familiar principles, is the retaining of a thing in actual possession belonging to another, until some debt or duty due from the owner to the holder is discharged.

The most usual contracts of affreightment in England are those by which the owner of the vessel undertakes to carry the merchandise for the shipper, and in such case, whether 252
the freight is reserved in the shape of a charge upon the goods, or hire of the vessel by the month, by the ton, or a gross sum for the voyage, seems to make no difference, for

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the vessel is still in the possession of the owner, and of course the merchandise. And it is also most usual to stipulate that the goods are bound for the freight, or that freight shall be paid or secured on delivery; and in all such cases the lien is considered perfect, notwithstanding there are covenants in the charter-party for the payment of freight.[1] And it is also settled, that in such cases, if other persons ship goods in the vessel by contract with the hirer, for a freight different from that which is agreed on in the charter-party, the goods are held for the freight due upon them to the owner of the vessel, because the shipper may require to be informed of the contract between the hirer and the owner, and may there see that the goods to be laded are bound for the freight. *Faith* v. *E. I. Company*, 4 Barn. & Ald. 640; *Gracie* v. *Palmer*, 8 Wheat. 605. But these cases go upon the ground, that the special contract by charter-party, so far from providing any thing like an abandonment or waiver of the common law right to retain the goods for the price of transportation, recognises and expressly enforces that right. And they also consider the possession of the vessel, by the terms of the contract, to remain in the general owner.

But there is a class of cases of a quite different aspect, which very clearly and fully adopt the qualification of the right of lien as stated in the elementary books before cited, Lawes and Chitty, which writers extracted their propositions from the various judicial decisions upon the subject.

Thus in *Phillips* v. *Rodie*, 15 East, 547, it was decided, that the ship-owner has no lien on goods, for any thing beyond the freight on the specific goods, although by the covenants in the charter-party he has a right to a greater compensation, notwithstanding there is a stipulation that the goods on board shall be bound for performance of the covenants. This case establishes the distinction between the freight which is attached to the goods, for which there is a lien, as it is not
253 waived by the charter-party, and the sum due on the contract for the hire of the vessel, for which there is no lien. And the

[1] See *Schooner Volunteer and Cargo*, 1 Sumner, 551, 577.

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same point was decided in chancery. *Gladstone* v. *Birley*, 2 Meriv. 401.

A case in the Common Pleas in England, *Hutton & al., Assignees*, v *Bragg*, 7 Taunt. 14, is worthy of notice, if it were only for the very handsome manner in which, in a subsequent case, (*Christie* v. *Lewis*, 2 Brod. & Bing. 416,) *Dallas* C. J. apologizes for adhering to, and *Park* J. for abandoning their several opinions. The case itself however is right in principle, and was overruled on account of a supposed wrong construction of the charter-party, rather than for any erroneous decision of a strictly legal character. The defendant, Bragg, was the owner of a ship. He chartered her to the bankrupt for a voyage from London to the Cape of Good Hope and back. He was to have 2100*l.* for the voyage, one fourth part immediately by bills on London at two months, one fourth by like bills at four months from clearing out, one fourth by government bills in ten days after discharging at the Cape of Good Hope, and one fourth by bills at three months from the time when the vessel should be reported inwards at London ; and for performance the hirer bound the goods laden on board. The last payment in bills could not be made, the hirer having become bankrupt, and some of the other bills were not paid, and 70 pipes of wine, part of the cargo, were held by the defendant, the ship-owner. It was determined that he had no lien, because he had no possession of the vessel, it being by the contract transferred to the hirer. In the case in Brod. & Bingh. this decision was overruled for the reason before stated. But all the judges were of opinion, that if the possession had gone entirely from the owner, the decision would have stood.

In the case of *Tate* v. *Meek*, 8 Taunt. 280, a decision took place before the same judges who decided the preceding case of *Hutton* v. *Bragg*, which shows very clearly the true distinction as taken by the court. In the charter-party it was stipulated that there should be paid to the owner a certain sum per ton on the merchandise, *viz.* 300*l.* in cash on the day when the vessel should be reported inwards, the remainder by a good bill or bills, payable at London, at two months after 254
date from the day on which the delivery should be completed.

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The hirers had assigned their interest to the plaintiffs, who demanded the goods without tendering the freight, and the defendant refused to deliver; in which he was upheld by the court, on the ground that the delivery of the goods and payment of freight are concomitant acts, which neither party is obliged to perform without the other being ready to perform the correlative act.

The case of *Yates & al.* v. *Railston*, and still another case (*Yates* v. *Meynell*) were decided on the same principle. 8 Taunt. 293, 302.

The American cases in which this question has been brought into view, have been decided upon the principles finally adopted in England.

In *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 49, a distinction is suggested which lies at the foundation of the law on this subject, namely, that a person may be owner for the voyage, who by a contract with the general owner hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. But where the general owner retains the possession, and contracts to carry a cargo on freight for the voyage, the charter-party is considered a mere affreightment, sounding in covenant. And it was in reference to this distinction that the case in 8 Wheat. before cited was determined.

Now on recurring to the charter-party, which is the foundation of the defendant's claim, in this view of the case, it will appear manifestly that there are two grounds, upon both of which probably, upon one certainly, his claim of lien upon the goods must fail.

One is the possession of the vessel. She is let to hire for the voyage, for a certain sum per month, and the master is appointed by Lander the hirer. Lander then had the exclusive possession, command and navigation of the vessel, so that the cargo on board was in his, and not in the defendant's possession. He had nothing to retain. [1] He had got possession to be sure, but that possession was tortious, unless it should be deemed otherwise on the other point in the case.

[1] See *Drinkwater* v. *Brig Spartan*, 3 Amer. Jurist. 26; 3 Kent's Comm (3d ed.) 220, 221, 137, 138; Holt on Shipping, 460, 471.

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But if it should be questioned whether such is the effect of the contract, considering that the defendant was to victual and man the vessel at his expense, the other point is free from any such difficulty. There is no express provision that the cargo is bound for the hire. Nor is it even implied, for the delivery of the cargo and the payment of the charter money are not concomitant acts. On the contrary, the money is to be paid in thirty days after the arrival of the vessel at Boston. By necessary implication, therefore, the vessel is to be discharged before the payment. The cargo is to go into the hands of the hirer, and the lien does not commence until thirty days after. This is wholly inconsistent with the doctrine of lien, for the voluntary parting with the thing for a moment destroys it. Can it be pretended that the goods are to remain on board until the time of payment arrives? This would effectually destroy the credit intended to be given. The very purpose of the time given was, that the hirer might have an opportunity to sell his cargo, to enable him to pay for the charter. The goods then were assignable, attachable, liable to be seized on execution, and the defendant had no means of preventing it, for he had no legal demand, no debt was due, until the thirty days had expired.

To adopt the language of Lord *Hardwicke* in the case of *Paul* v. *Birch*, 2 Atk. 621, — "A person that lets his ship to hire, ought to take care that the hirer is a substantial man, and sufficient to make good the hire, and it is his business to look into this."

A number of cases have happened in New York, in which the doctrine we think applicable to this case has been affirmed. I select two only of the most recent.

Chandler v. *Belden*, 18 Johns. R. 162. *Spencer* C. J. delivering the opinion of the court says, — "The right to retain the cargo for freight has grown out of the usage of trade, and it does not exist, nor can it be enforced, when the parties have expressly regulated the time and manner of paying freight, by stipulations in a charter-party, and especially if the cargo is deliverable before the arrival of the periods of payment." And in *Clarkson* v. *Edes*, 4 Cowen, 478, the same doctrine is held and enforced by *Savage* C. J.

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Thus we think our way is clear to decide, that the defendant, after he had chartered his vessel in the manner shown by the charter-party, had no claim of lien upon the cargo for the hire, but his whole security was in the personal engagement of Lander.[1] And the bill of lading signed by the master in Brazil, whereby the goods are to be delivered to Lander or his order or assigns, he or they paying freight, makes no difference, as the charter-party wholly supersedes the bill of lading, except as a usual document to show to whom the goods are to be delivered, and to make the master liable. Abbott, (ed. 1810 by Story,) 215, note, cites *Hunter* v. *Prinsep*, 10 East, 378.

On the second question no authorities have been cited, nor have we been able to find any.

Did the going to New York to deliver freight there, with intention to terminate the voyage there or at Boston as the owner of the vessel or the cargo should direct, rescind or vacate the charter-party, so as to give the defendant the right to claim the freight or the merchandise on board and retain it until paid, in the same manner as if there had been no charter-party and the voyage had terminated in the usual manner? According to the charter-party the voyage home is from Rio Grande to Boston; but the vessel being hired by the month, the delay (if any) could cause no injury to the defendant. It would seem to be a close construction of such a contract, which should prevent the charterer from touching at intermediate ports in the course of the voyage, when he has purchased the use of the vessel, and is to pay for the hire of her as long as he employs her. Without doubt, if he should undertake to send the vessel upon a different voyage from the one described, having no view to that voyage but to another, the owner might repossess himself of the vessel and prevent such a fraudulent act. But the mere fact of taking freight for, and delivering it at a neighbouring port, entirely in the course of the voyage, we can hardly think can be followed by that consequence. If the vessel were hired by the run, or the freight were to be paid only on such goods as should be laded on

[1] See 3 Kent's Comm. (3d ed.) 220, 221.

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board, the owner would have a remedy for any delay or damage by an action of covenant. But where the vessel is let to hire as in this case, no injury can be perceived, or if any has happened, a remedy can be had without so serious a wrong to the other party as the breaking up of the whole contract. It is said in argument, that the same fact would constitute a deviation, so as to avoid any insurance which the defendant might have on the vessel for the voyage described in the charter-party. If this be true, and we think it is, provided no right was secured in the policy to touch and stay or trade, certainly an action would lie against the charterer on the implied covenant to pursue the voyage home without deviation.[1] But because a policy of assurance would be thus avoided, it does not follow that the voyage home could be broken up, the cargo discharged, and the charterer obliged to seek another vessel for the transportation of his cargo to the place of its destination.

We do not perceive how the defendant could have acquired the right to freight on this cargo, which had been sold by Lander to the plaintiff without the incumbrance of freight. Surely if the vessel had come directly to Boston, he could not. He chooses to prevent the accomplishment of the voyage, but he does not thereby acquire any new rights. The freight entered into the value of the goods when purchased, and the plaintiff must therefore be considered as having paid it to Lander. The defendant's original security remains, upon the charter-party, unless he has impaired it by his own act. The vessel remained Lander's during the voyage, and the voyage would have terminated at Boston but for the interference of the defendant. If there is freight due for the return cargo, it is due to Lander, for he was the owner of the vessel *pro hac vice*, and the plaintiff must account to him for the price of the goods, which will include the freight.

There are reasons for strictness in regard to insurance contracts, which do not apply with the same force to charter-parties. The insurer has no remedy for a defect of strict per-

[1] See Abbott on Shipping, (4th Amer. ed.) 192; *M'Andrew* v. *Adams*, 1 Bingh N. R. 29

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formance, but in avoiding the contract. The least deviation out of the usual track, the stopping at a port longer than may be absolutely necessary, may be the cause of a loss, but never can be proved to be so. The only safety for the underwriter is to exact a strict compliance with the contract. It is otherwise in a charter-party, for the covenants give a remedy for any actual loss or damage. Now let us suppose that the vessel had returned to Salem instead of Boston, intending to go to Boston after leaving some goods taken on freight for Salem; shall the owner have a right to take possession and retain the cargo belonging to others as security for his charter money? Shall he rescind the contract entirely, and stand in the place of the hirer in regard to the goods on board? We think not If a completion of the voyage according to the contract was intended, we do not think such a slight deviation from it vacates the contract.

Lander having hired the vessel by the month, with liberty to put any goods on board except contraband, he had a right to take the goods of other people on freight. The freight may have been paid in advance. Shall the goods be liable to freight again in consequence of the rescinding of the contract by Woods? It must be remembered, that Woods has his security in the covenants in the charter-party. The insolvency of Lander was a contingency which he ought to have provided against. It cannot give him rights distinct from his contract. He might have secured a lien upon all goods which should be laden on board the vessel, whether belonging to Lander or any other person, but he did not. On the contrary, he gave Lander thirty days' credit after the arrival of the vessel. The vessel would probably have come to Boston, but for the interposition of the owner. And he knew this, for she was to be discharged at New York or at Boston, according to the directions of himself and Lander. He chose to put an end to the voyage at New York, and the other party, Pickman, assenting, his right to freight under the charter-party accrued in thirty days from that time.

Upon the whole, in the absence of all authority upon the subject, and considering that the owner of the vessel has a remedy on his covenants, for any injury he might sustain by

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a slight departure from the strict course of the voyage, and that he was to be paid by the month for the use of the vessel, we are inclined to think that Boston, as the terminus of the home voyage, was inserted rather to determine the time from which the payment of freight is to be reckoned, than as limiting the voyage strictly to that port. The general rule is, that the construction of a charter-party shall be liberal, agreeable to the real intentions of the parties. Abbott (3d ed.), 203. Hence where a vessel was taken on charter by the month, freight to be paid on her arrival in the Thames, and after an absence of two years she was lost before getting into the Thames, it was considered nevertheless that the freight should be paid, because the place of her arrival was mentioned only to designate the time when the freight should be payable. Malyne, 101 ; Abbott (3d ed.), 297.

Judgment for the plaintiff on the verdict.[1]

Abigail Thompson *versus* David Hale.

Where a promissory note on demand, with interest under the legal rate payable semi-annually, made by H & C, copartners, in the name of the firm, to C or his order, was indorsed to the plaintiff after six months as collateral security for money borrowed by C, it was *held*, in an action against H, the surviving partner, that under those circumstances the plaintiff took the note subject to all the equity existing against it in the hands of C, the payee.

Assumpsit on a promissory note, dated June 7, 1824, for 7000 dollars, with interest semiannually at the rate of five per cent, signed "Hale & Cross," payable on demand to Cross or his order, and by him indorsed to the plaintiff. The receipt of six months' interest was indorsed, under the date of December 10, 1824.

At the trial, before the *Chief Justice*, the plaintiff's counsel produced another promissory note, dated December 22, 1824, made by Cross, for 4000 dollars, payable to the plaintiff in nine months with interest, and stated that the note in suit was indorsed to the plaintiff as collateral security for this

[1] See *Schooner Volunteer and Cargo*, 1 Sumner, 551.

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other note, which was given on a loan of 4000 dollars by the plaintiff to Cross.

In defence it was stated, that Hale and Cross were general partners in trade, according to indentures entered into be-

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tween them, by one article of which it was provided, that Cross should supply a capital of 15,000 dollars for the use of the firm, and that on the day of the date of the first note he did in fact pay towards this capital the sum of 7000 dollars, for which the note was given, there being entered upon that part of the indentures which was held by Hale, an agreement signed by Cross, that no use should be made of the note inconsistent with the articles of copartnership. In those articles it was agreed, that the transactions of the firm should be confined to auction and commission business, that no operation or speculation out of their regular business should be entered into by either partner without the consent of the other, that there should be an equal division of profit or loss, and that at the dissolution of the company the business should be closed and the profits or losses ascertained by first paying the capital with interest, and all other debts of the company.

Cross died in June, 1825, and according to a statement made by Hale of the partnership accounts, nothing was due to Cross from Hale & Cross.

All the evidence touching the agreement between Hale & Cross in relation to the note, and the state of the accounts of the firm, was objected to by the plaintiff's counsel, as not applicable to the plaintiff, who was an indorsee for a valuable consideration and was not proved to have had knowledge of any thing which tended to impeach the validity of the note in suit. But it appearing that she received the note as collateral security only, more than six months after its date, and that the form of the note and the relation of the parties indicated something out of the ordinary course of business, and there being no evidence that the defendant was a party or privy to the transfer of the note to the plaintiff, or that he had any interest in the loan made by the plaintiff to Cross, the chief justice admitted the evidence. Whereupon the plaintiff consented to a nonsuit, with liberty to move to take it off and to have a trial, if the evidence was inadmissible, or if the plaintiff could

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make it appear that Hale would be indebted to the estate of Cross upon a final adjustment.

Cooke, for the plaintiff, cited *Dow* v. *Tuttle*, 4 Mass. R. 414; *Shed* v. *Pierce*, 17 Mass. R. 623; *Chapman* v. *Searle*, 3 Pick. 38; *Clark* v. *Leach*, 10 Mass. R. 51; *Webster* v. *Lee*, 5 Mass. R. 334; *Ayer* v. *Hutchins*, 4 Mass. R. 372; *Barough* v. *White*, 4 Barn. & Cressw. 325; *S. C.* 6 Dowl. & Ryl. 379; *Field* v. *Nickerson*, 13 Mass. R. 138.

Hubbard and *B. Sumner*, for the defendant, cited *Wilson* v. *Clements*, 3 Mass. R. 11; *Hemmenway* v. *Stone*, 7 Mass. R. 59; *Ayer* v. *Hutchins* and *Field* v. *Nickerson*, *ubi supra*; *Furman* v. *Haskin*, 2 Caines's R. 369; *Prior* v. *Jacocks*, 1 Johns. Cas. 169; *Gill* v. *Cubitt*, 5 Dowl. & Ryl. 324; *Smith* v. *De Witts*, 6 Dowl. & Ryl. 120; *Bosanquet* v. *Wray*, 6 Taunt. 597; *Livingston* v. *Hastie*, 2 Caines's R. 246; *Lansing* v. *Gaine*, 2 Johns. R. 300; *Livingston* v. *Roosevelt*, 4 Johns. R. 251; *Manufacturers &c. Bank* v. *Binney*, 5 Pick. 11; *Smith* v. *Lusher*, 5 Cowen, 708.

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PARKER C. J. We think the evidence offered in defence to this action was rightly admitted.

In the first place, the note was not indorsed until after it became due according to its terms, which in ordinary cases is enough to let in evidence which between the original parties might go to defeat the note.[1] In answer to this it is argued, that by the form of the note it is apparent that it was not intended to be paid according to the letter of the contract, for the interest is to be paid semiannually, and is at five per cent only. This is true, but these same circumstances had a tendency to show that it was not a regular business note, but that there might be circumstances between the parties to it which might affect the validity or the amount of it. Then again, one of the promisors and the payee is the same person. It is a note from a firm to one of the firm, which carries an indication that it had relation to partnership concerns and was to be governed by them: adding to all this, that the plaintiff did not

[1] See Bayley on Bills, (2nd Am. ed.) 135 to 137, and cases cited in the notes; 3 Kent's Comm. (3d ed.) 91; *Stockbridge* v. *Dsmon*, 5 Pick. 225; *Sylvester* v. *Crapo*, 15 Pick. 93.

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take the note in the course of business, but as collateral security from the payee,[2] who had given her a note for money borrowed on the same day, the conclusion is irresistible, that the plaintiff made inquiry and understood the use and purposes for which this note was given, and so took it liable to all such
262 equitable grounds of defence as might have been made had the payee, if he could by law, sued Hale. A note may be dishonored on its face, or the indorsee may take it with notice that there are legal or equitable set-offs between the parties; and in either case he must submit to such defence as a suit between the parties would justify.

If the indorsee receives the note under circumstances which might reasonably excite suspicions that it was not good, he ought, before he takes it, to inquire into the validity of the note, and if he does not, he takes it subject to any legal defence which might be made against a recovery by the promisee; the being overdue is only one circumstance. *Ayer* v. *Hutchins*, 4 Mass. R. 372.[1]

The nonsuit is to stand therefore, unless the plaintiff furnishes some ground to suppose, that on a trial it will appear that Hale is so indebted to the firm, or that the firm is so indebted to Cross, as to entitle her to recover.

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[2] See Bayley on Bills, (2nd Am. ed.) 545; *Bristol* v. *Sprague*, 8 Wendell, 423; *Ross* v. *Brotherson*, 10 Wendell, 85; *Smith* v. *Van Loan*, 16 Wendell, 659.

[1] See also Bayley on Bills, (2nd Am. ed.) 544, 545. and cases cited in the notes; 3 Kent's Comm. (3d ed.) 91 to 93; *Cone* v. *Baldwin*, 12 Pick. 545 *Goddard* v. *Lyman*, 14 Pick. 268; *Grew* v. *Burdett*, 9 Pick. 265

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JOHN SMITH *versus* JAMES DENNIE.

A and B, joint owners of a chattel, sell it on a condition precedent and make a delivery subject to the condition; which not being complied with, and the chattel being attached by a creditor of the vendee, A sells his part to B, who replevies the chattel. *Held*, in such action, that A was disinterested, and so a competent witness.

A voluntary delivery of a chattel sold upon condition, without the delivery's being *sub conditione*, exposes the property to attachment by the creditors of the vendee.

Where a chattel was sold upon condition that the vendee should give an indorsed note, but was delivered without any express reference to the condition, and remained in possession of the vendee eight days, when it was attached by his creditors, the vendor having made no claim during that period either for the note or the chattel, and no reason was assigned for omitting such a claim, it was *held*, that there was a waiver of the condition, so far as to warrant the attachment, and that a verdict to the contrary was against the evidence.

REPLEVIN for ten boxes of sugar. The defendant, who was a deputy sheriff, pleaded that the sugar belonged to Fairfield and Holland, and that he attached it as their property. The plaintiff replied that the property was in himself; and issue was joined thereon. A trial was had before *Parker* C. J.

On the first of February, 1827, preceding the attachment, 263
the sugar belonged to the plaintiff and one Sears. The plaintiff claimed title to the whole by virtue of a sale made to him by Sears after it was attached, and he relied upon the testimony of Sears; who was objected to as being interested in the event of the suit, but he having stated that he had then no interest, having sold his half of the sugar to the plaintiff for one half of the supposed value, and that he was in no way accountable to the plaintiff if he failed to maintain his title, he was admitted.

Sears testified, that on the first of February he sold the sugar to Fairfield on the express condition that he should give a promissory note for the price, with Holland as an indorser. The sugar was delivered to Fairfield by the clerk of the witness, in his absence from the store, and nothing was said at the time respecting the condition. The plaintiff was in New York at the time of the delivery, and no note was given. The witness stated that he did not know of the delivery until the

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next day. A bill of parcels, not receipted, was given to Fairfield when the sugar was taken away from the store. The witness testified that it had been usual for him, and he supposed it was for others, to deliver goods before the security was given. No demand of the note was made until after the attachment, which was eight days after the bargain and delivery. Afterwards the plaintiff applied to Fairfield to furnish the note, or to give up the sugar; which he said he was unable to do, but would, if the creditors who had attached, would consent. The plaintiff also applied to Holland to indorse a note, which he declined. It was testified by Fairfield, that he and Holland were secret partners; but Sears testified that this was not known to him when he made the sale; that he asked Fairfield whether Holland was his partner, and was answered that he was not, but soon would be. They were in fact, however, secret partners at that time.

The principal question at the trial was, whether the sale by Sears to Fairfield was absolute or conditional; and there was contradictory evidence on this point, Fairfield, who was called
264 by the defendant, having testified that the sale was absolute. The verdict established the fact that it was conditional, as testified by Sears. The defendant excepted to the verdict, on the ground, that admitting the sale to have been conditional, delivering the sugar without taking the note and suffering it to remain so long a time in the possession of Fairfield, and omitting to rescind the bargain by demanding the sugar, during that time and until after the attachment, made the property Fairfield's, so as to be liable to attachment by his creditors. This was reserved as a question of law, the jury having determined that in point of fact there was no intention on the part of Sears to waive the condition. On this point the jury were instructed, that though nothing was said, at the time of the delivery, about the condition, yet if they believed it was not intended to waive it, they might consider it in force.

The defendant objected too, that the action could not be maintained by the plaintiff alone, but that Sears ought to have been joined. He also moved for a new trial, because Sears was admitted as a witness.

March 26th. *Bassett*, for the defendant, insisted, that although the sale

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was conditional, the delivery by the clerk, which was ratified by the acquiescence of Sears, was unconditional, so that the property was liable to be attached by the creditors of Fairfield; 2 Kent's Comm. 391; *Carleton* v. *Sumner*, 4 Pick. 516; — that the verdict, in finding that the condition had not been waived, was against the evidence; — and that the instruction of the judge on this point was incorrect, inasmuch as suffering the sugar to remain so long in Fairfield's possession without demanding the note was in law a waiver of the condition. *Payne* v. *Shadbolt*, 1 Campb. 427. Sears was not a competent witness, for he had a legal interest in the property, and the suit should have been brought by him and Smith jointly. They could not recover the sugar except by an action of replevin, so that in regard to a part, Smith was only the assignee of a chose in action, and consequently must sue in the name of the assignor. 3 Chitty on Com. & Manuf. 561.

Fletcher, for the plaintiff. The sale to Smith was not of a right in action, but of a parcel of sugar. Our ground is, that 265
the property did not pass to Fairfield, and Sears might as well sell his interest when the sugar was in the possession of Fairfield, as if it had been in his own hands.

The question whether the verdict was against evidence is not open. There was sufficient evidence (some of which is not reported) to warrant the jury in finding that the condition was not intended to be waived. The instruction of the judge was right. In the cases generally the question has been, whether the delivery was intended to be absolute or conditional, and where it was not intended to be absolute, the property has been held not to have passed. *Hussey* v. *Thornton*, 4 Mass. R. 405; *Marston* v. *Baldwin*, 17 Mass. R. 611; *Barrett* v. *Pritchard*, 2 Pick. 515; *Carleton* v. *Sumner*, 4 Pick. 516; *Palmer* v. *Hand*, 13 Johns. R. 434; *Haggerty* v. *Palmer*, 6 Johns. Ch. R. 437; *Harris* v. *Smith*, 3 Serg. & Rawle, 20; *Chapman* v. *Lathrop*, 6 Cowen, 110.

PARKER C. J. delivered the opinion of the Court. It was *June 21st*
left to the jury to say whether the sale of the sugar was conditional, and they have found that it was, upon a comparison of the testimony of Sears and Fairfield, between whose accounts of the transaction they had a right to choose on which to rely.

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We consider Sears to have purged himself of all interest, by his sale to Smith, which sale is undoubtedly valid if the property of the sugar was not then in Fairfield for the benefit of his creditors.

The point of the case is, whether at the time of the sale, Fairfield then being in possession without fraud, on a purchase previously made of Sears acting for himself and Smith, the property was not so far in him as to warrant the attachment by his creditors.

And this depends upon the question, whether the delivery after the sale was free from the condition on which the purchase was made. In the case of *Hussey* v. *Thornton* the delivery was conditional, as well as the sale, and so the property was held to continue in the vendor. That the condition of a sale may be waived, so that the property will vest in the vendee notwithstanding he has not performed the condition, seems
266 to be well settled in that case of *Hussey* v. *Thornton*, and in a more recent case of *Carleton* v. *Sumner*, 4 Pick. 516; [2nd ed. 517, note 1;] and the doctrine thus settled here is adopted by chancellor *Kent* in his Commentaries, 2 vol. 391. [3d ed. 497.]

The principle is, that if the vendor who has sold upon condition, permits the vendee to take the goods without exacting of him a compliance with the terms of the sale, he shall be presumed to have abandoned the security he intended, and to trust to the personal security of the vendee; and whether such is the state of things or not is matter for the jury to settle upon the facts proved. We do not think, after a conditional bargain has been made and a delivery immediately taken place upon the expectation that the contemplated security shall be produced, without an express declaration that the delivery is also conditional, that the sale *ipso facto* becomes absolute; because there is an implied understanding that the vendee will act honestly, and he takes the goods subject to the contract, which is, that he shall furnish the security which was the condition of the sale, as soon as he shall have opportunity to procure it; and it would much embarrass sales at auction and other sales, to require that the vendor should in all cases insist upon the note or other security being produced before the

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goods shall be delivered. And in case no new credit is obtained by the vendee in virtue of his possession of the goods, no wrong is done by allowing the vendor to reclaim them.

If they are sold by the vendee, he having the possession delivered to him by the vendor, the purchaser not knowing of the condition, the case would be different, as the vendor would be considered as having delivered them for the very purpose of enabling the vendee to use them in trade and merchandise, trusting to the performance of the condition by the vendee. [1] But there seems to be no good reason why an antecedent creditor, watching the transactions of his debtor, should have a right to seize upon goods which came into his possession, when he has not paid for them, or given that security without the promise of which he could not have obtained the goods. Such creditor has not trusted on the faith of the goods, and is therefore not prejudiced by being restrained from attaching them.

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It was therefore for the jury to decide this case, and upon the question put to them by the Court, *viz.* whether there was an intention on the part of Sears, the vendor, to deliver absolutely, and so to waive the condition on which the sale was made. We understand the case of *Carleton* v. *Sumner* was so put to the jury in effect; for if there was a right by the contract to insist upon the promised security before the goods were delivered, this right could not be lost but by an intentional waiver; so that the question now is, whether the verdict is against the evidence on that point. Here the condition of security by an indorsed note must be considered to have been absolute and explicit. The goods are delivered by the clerk without any thing being said about the security, a bill of parcels is given, but without any receipt, no note is taken, and no money paid. The vendor certainly had a right the day after to insist upon his indorsed note or to rescind the bargain and reclaim the goods. If so, why not two days or three, and if so, the time which elapses is a mere fact, from which the jury may infer the intention. Circumstances of business and engagement may account for the delay, and if they do, the right

[1] See 3 Kent's Comm. (3d ed.) 497, 498.

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to security or to reclaim the goods, unless sold as before mentioned, is not impaired. And perhaps the law would be the same, if the sale had been for cash, and not on credit, for even in such case the mere delivery with an expectation of receiving the price in a short time, does not divest the property of the vendor. 2 Kent's Com. 391. [3d ed. 497, 498.][1]

But in the case before us, eight days passed between the delivery of the goods, and any call for the indorsed note,[2] nor was any intimation made of the security to be given, when the goods were delivered by the clerk; who does not appear to have been informed by the vendor of the terms of the sale. The latter, however, must be presumed to have known the next day that they had been delivered, and yet he did not send for the note, or give any manner of notice that it was required, until the attachment took place eight days after the sale. We are apprehensive, that to establish the right to reclaim under such circumstances, would widen the door for fraudulent con
268 trivances, and that afterthoughts respecting conditions will spring up to intercept attaching creditors, when the sale was really unconditional, or at least when the vendor has thought his condition of so little importance as to be willing to abandon it and trust to the credit of the purchaser.

We are of opinion that the verdict is against the evidence,[1] for there was nothing in the case from which an intention to hold on upon the condition can be inferred; — no declaration at the time, which though not necessary is important, and no call for security until it was forgotten or abandoned, and perhaps never would have been recurred to if the goods had not been attached.

The case is like that of *Hussey* v. *Thornton*, before cited, in which it was determined that a voluntary delivery of goods

[1] See *Corlies* v. *Gardner*, 2 Hall's (N. Y.) R. 345; *Reeves* v. *Harris*, 1 Bailey, 563; *Ayer* v. *Bartlett*, *ante*, 79, note 2; *Whitwell* v. *Vincent*, 4 Pick. (2nd ed.) 452, note 1; *Riddle* v. *Varnum*, 20 Pick. 280; *Lupin* v. *Marie*, 6 Wendell, 77.

[2] See *Lupin* v. *Marie*, 6 Wendell, 77; *Furniss* v. *Hone*, 8 Wendell, 247; *Corlies* v. *Gardner*, 2 Hall's (N. Y.) R. 347; *De Wolf* v. *Babbett*, 4 Mason 294; *Copland* v. *Bosquet*, 4 Wash. C. C. R. 588; 2 Kent's Comm. (3d ed.) 497, 498.

[1] See *Andrews* v. *Hunneman*, *ante*, 130, note 1.

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sold upon condition, without the delivery being *sub conditione*, exposes the property to attachment by the creditors of the vendee. And it was upon the same principle that the case of *Carleton* v. *Sumner*, also before cited, was decided. We think for the foregoing reasons a new trial must be granted.

ELIAS BEAN *versus* HENRY FARNAM *et al.* 269

If an administrator submits to arbitration a demand against the estate of his intestate, the award will be binding upon him.

In debt on an award, a plea that no award was made according to the terms of the submission, is bad, inasmuch as it does not deny nor confess and avoid the award set forth in the declaration, except argumentatively.

In cases of corruption in arbitrators, or where they exceed their authority, or commit gross mistakes in their award, the defendant may obtain relief by pleading the matter in an action on the award. — Thus a plea that the arbitrators omitted to take into consideration certain promissory notes submitted to them, is valid. So of a plea that they took into consideration matters not within the submission.

In an action on an award, a plea that the arbitrators made a gross mistake, for that they included in the award demands not included in the submission and omitted to include others which were submitted, and in several instances made the defendant debtor twice for one and the same thing, (not specifying the claims improperly allowed or disallowed or twice allowed,) was held bad for duplicity, and also for want of certainty.

Nil debet is a good plea to an action of debt upon an award.

DEBT. The declaration set forth, that on the 2d of June, 1826, the defendants, as administrators of Stephen Bean, and the plaintiff, by articles of agreement in writing, submitted all claims and demands in difference between them to arbitration, it being expressly agreed that the defendants should not be held personally responsible by reason of any thing contained in the submission; that the arbitrators, within the time limited, made and published an award, in which the sum of 2314 dollars and 79 cents was awarded to the plaintiff, to be claimed by him as a creditor of the intestate's estate.

The defendants pleaded, 1. *Non assumpsit*; to which there was a demurrer.

2. That no award was made by the arbitrators according to the terms of the submission set forth in the declaration. To this there was a demurrer, assigning for cause, that the plea does not admit nor deny the making of the award set out in the

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declaration, but alleges argumentatively that no award was made according to the terms of the submission.

3. That the arbitrators, on the 24th of June, 1826, made an award, to which was annexed an account between the estate of the intestate and Elias Bean, showing a balance due from such estate to Elias of 2314 dollars 79 cents, and that they awarded that sum to Elias; that they stated an account current between Elias and the estate of the intestate, which together with a certain account of the estate against Elias Bean & Co., and Bean & Blake, they annexed to and made a part of their award. And the defendants aver, that it is apparent upon the face of the accounts, that the arbitrators made a gross mistake in allowing the same charges twice, that is to say, they allowed the plaintiff the sums of 5122 dollars 4 cents, and 3777 dollars 75 cents, for Bean & Blake's notes, which notes are again included in the sum of 21,041 dollars 22 cents, allowed by them. The plaintiff replied, after setting forth the accounts mentioned in the plea, that it was not apparent on the face of these accounts that the arbitrators made any mistake in allowing the same charges twice, as alleged by the defendants. To this replication the defendants demurred.

4. That at the hearing before the arbitrators, the defendants proved that they were entitled to claim of the plaintiff the amount of two promissory notes indorsed to the intestate by Elias Bean in the name of Elias Bean & Co., he carrying on business alone under that name, but the arbitrators omitted to take these notes into consideration when they made their award; and so the award was void. To this there was a demurrer.

5. That two notes given by Elias Bean and his partner, Blake, to the intestate, in discharge of a balance due from Elias to the intestate, were allowed by the arbitrators as a charge by Elias against the estate, and that they also included in the account which they made part of their award, "various demands not included in said submission, and omitted to include therein various just demands of said Stephen's estate against said Elias, which were in fact submitted to them, and they also in several instances made the said Stephen's estate

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debtor to said Elias twice for the same thing." To this the plaintiff demurred for duplicity.

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7. *Nil debet*; — to which there was a demurrer.

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Fletcher, for the plaintiff, cited in support of the demurrer to the sixth plea, *Perkins* v. *Wing*, 10 Johns. R. 143; *Cranston* v. *Kenny's Executors*, 9 Johns. R. 212; 1 Saund. 327 *a*, note 2; *Newland* v. *Douglass*, 2 Johns. R. 62; *Barlow* v. *Todd*, 3 Johns. R. 367; *Homes* v. *Aery*, 12 Mass. R. 134; *Bulkley* v. *Stewart*, 1 Day, 130; *Mulder* v. *Cravat*, 2 Bay, 372; *Goldsmith* v. *Tilly*, 1 Har. & Johns. 364; *Roosevelt* v. *Thurman*, 1 Johns. Ch. R. 226; *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. R. 364; *Ridout* v. *Pain*, 3 Atk. 494; *Tittenson* v. *Peat*, ibid. 529; *Young* v. *Walter*, 9 Ves. 365; and as to the eighth plea, *Rawlins* v. *Danvers*, 5 Esp. R. 38; *Wills* v. *Maccarmick*, 2 Wils. 148.

Hubbard and *Nichols*, *contrà*, cited in support of the fifth and sixth pleas, *Mitchell* v. *Staveley*, 16 East, 58; *Harker* v. *Hough*, 2 Halstead, 428; 2 Saund. 84 *c*, note; *Williams* v. *Paschall*, 3 Yeates, 565; *Brown* v. *Bellows*, 4 Pick. 179; 1 Dane's Abr. 261; *Boardman* v. *England*, 6 Mass. R. 71; *Thrasher* v. *Haynes*, 2 N. Hampsh. R. 429; *Macomb* v. *Wilber*, 16 Johns. R. 227; *Jackson* v. *Ambler*, 14 Johns. R. 108 *et seq.*; *Fisher* v. *Pimbley*, 11 East, 192; *Allen* v. *Watson*, 16 Johns. R. 208; — *Strong* v. *Smith*, 3 Caines's R. 160; *Patcher* v. *Sprague*, 2 Johns. R. 466; *Douglass* v. *Satterley*, 11 Johns. R. 19; — and in support of the eighth plea, *Warren* v. *Flagg*, 2 Pick. 448; Co. Lit. 295 *a*; Com. Dig. *Pleader*, 2 *W* 13; *Warren* v. *Consett*, 2 Str. 778, and 8 Mod. 107; 2 Chit. Pl. 476; Tidd's Pr. 593; *Parsons* v. *Hall*, 3 Greenl. 60.

June 21st

WILDE J. delivered the opinion of the Court. This is an action of debt on an award of arbitrators made upon a submission in writing, not under seal, and the defendants in the first place object to the submission, because they say that an executor or administrator is not authorized to submit a controversy between himself and another, in right of his testator or intestate, to arbitration, and that any award depending on such a submission is void. This objection must have been made without much examination, for the authorities are all opposed

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to it. There are numerous cases in which the right of executors and administrators to submit to arbitration has been maintained; and indeed it does not appear to have ever been denied. So a guardian may submit for his ward; which however was formerly doubted. Kyd on Aw. 39.[1] The general principle is, that every one having the capacity to contract, or to release his right, may make a submission to an award. Kyd on Aw. 35. If a less sum should be awarded in favor of the executor or administrator than he would be entitled to recover at law, he might be held to account for the deficiency to the heirs, or other persons interested in the effects of the testator or intestate, but the award would be binding. 1 Dane's Abr. c. 13, Art. 2; Kyd on Aw. 39; *Worthington* v. *Barlow*, 7 T. R. 453; *Pearson* v. *Henry*, 5 T. R. 6; *Barry* v. *Rush*, 1 T. R. 691; *Coffin* v. *Cottle*, 4 Pick. 454. [*Swecard* v. *Wilson*, 2 Rep. Constitut. Court, (2nd series,) 218.]

This case, therefore, must be decided on the pleadings. The defendants have pleaded eight several pleas, which I shall consider in their order, passing over those which have resulted in issues of fact.

The first plea, which is *non assumpsit*, is clearly bad, and was intended, I presume, to be waived, as no attempt has been made to support it.

The second plea also is bad; it avers that no award was made according to the terms of the submission. This does not deny the award set out in the declaration, nor does it confess and avoid it. And if it could be considered as confessing the award, it does not avoid it, by alleging any fact to that effect, but only argumentatively, and by drawing in question the validity of the award, which is proper matter only for a demurrer.

The third plea is traversed and terminates in a question of fact to the jury.

The material allegation in the fourth plea is, that the arbitrators made a gross mistake in allowing the same charges twice; that is to say, that they allowed the plaintiff the sums of 5122 dollars and 4 cents, and 3777 dollars and 75 cents,

[1] See *Weston* v. *Stuart*, 2 Fairfield, 329.

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tor certain notes which were included in the gross sum of 21,041 dollars and 22 cents, which was also allowed. And this, it is averred, is apparent on the face of the account stated by the arbitrators. On looking into the account stated it appears that the sum of 21,041 dollars and 22 cents is debited on one side and credited on the other, so that in fact this sum was not allowed to the plaintiff in striking the balance. If the sum had been neither charged nor credited, the balance would have been the same. Though it be true therefore that literally these claims have been twice charged; it is no objection to the validity of the award, because they have been but once allowed. And if the defendants intended to rely upon a mistake of the arbitrators in relation to these charges, they should have pleaded that nothing was due thereon, and that the arbitrators inserted them by mistake in the account stated, or that it was done by them partially and corruptly. No such averment is made. On the contrary, in objecting to the double charge of the items in question, the defendants impliedly admit that they might in justice be once charged. Whether these charges ought to have been allowed or not, cannot be determined, we think, by reference to the account stated, because although the account states that the notes and items composing the gross sum of 21,041 dollars 22 cents were discharged by the assignment of Bean & Blake's effects, yet if the two sums allowed were paid by the plaintiff out of effects belonging to him, or to him and his partner, and he has accounted with his partner, the charge may be sustained; but as the matter is pleaded, this question is not raised, and the plea therefore is clearly insufficient.

The fifth plea raises an important question, namely, how far the merits of an award may be re-examined, and what matters may be pleaded to invalidate or vacate an award. By the English law no objection can be taken to an award in pleading, which does not appear on the face of it, and it cannot be thus impeached even for the misbehaviour of the arbitrators, or on account of gross errors and mistakes. The remedy in such cases is either by appealing to the summary jurisdiction of the court to set aside the award, or by a bill in chancery. But it seems that even in England the defendant may plead that a

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certain matter was submitted, of which notice was given to the arbitrators, and that they made no award concerning it. *Mitchell* v. *Staveley*, 16 East, 58. But if the arbitrators misbehave themselves or make a palpable mistake or miscalculation, a court of chancery may correct the mistake or miscalculation, or relieve against the partiality of the arbitrators by vacating the award, but these matters cannot be pleaded to an action on the award. And such is the law also in New York and in some of the other States in this country. So also is the civil law; but by this, as well as by the English law, there is a remedy against the award if it was procured by fraud and corruption. Dig. 4. 8. 32. 14.[1] But as our chancery powers do not authorize us to vacate or correct an award, there would be a failure of justice if the merits of an award might not in some cases be re-examined. In cases therefore of corruption in the arbitrators, or where they exceed their authority, or there are gross errors and mistakes in the award, relief may be granted, under our system of jurisprudence, by allowing the defendant to plead the matter in an action on the award. This was admitted in the case of *Williams et al.* v. *Paschall's Heirs*, 3 Yeates, 564, and it is stated in Dane's Abr. c. 13, *art.* 4, that such has been the practice in this Commonwealth. No case is cited in support of this position; but we are satisfied that justice requires that such a plea should be allowed.[2]

We are therefore of opinion that the fifth plea is good. It avers that the defendants proved before the arbitrators, that they were entitled to claim the amount of two notes of hand of the plaintiff, the one for 1800 dollars, and the other for 1200 dollars, but that the arbitrators omitted to take these notes into consideration, and that they were not in fact considered by them when they made their award. According to the case of *Mitchell* v. *Staveley*, 16 East, 58, before referred to, this plea would be good in the English courts. The plea in that case was, that a certain matter was submitted, of which notice was given to the arbitrators, and that they made no award con-

[1] See 2 Story's Comm. Eq. 675 to 684.

[2] See *Brown* v. *Bellows*, 4 Pick. (2d ed.) 192, note 1; Wharton's Dig *p.* 30, 31, *tit. Arbitrament and Award, I. E. f; Tyler* v. *Dyer*, 1 Shepley's (13 Maine) R. 41.

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cerning it; which is substantially similar to the plea under consideration; — and the court say, "They (the arbitrators) were called upon to act on a matter of controversy, and have not acted. The award, therefore, is not only not final, but there is no award at all respecting one of the matters in difference referred. The plea therefore in the present case does not require us to try over again a matter already tried by the arbitrators; but to determine whether the matter alleged has been tried at all, or has been wholly omitted. Such an inquiry is clearly proper,[1] and the plea therefore is good. So if the arbitrators took into consideration, as it is alleged in the third plea that they did, matters not submitted, that is a good objection to the award. *Fisher* v. *Pimbley*, 11 East, 193. Substantially the third and fifth pleas depend on the same general objection, namely, that the arbitrators did not pursue their commission.

The sixth plea is bad for duplicity. It is said that the several facts alleged in this plea go to support a single point of defence, namely, gross error in the award; but the errors alleged appear to us to be distinct matters of defence. One error, if made out, is as fatal to the award as several.

The plea is bad also for want of precision. It avers that the arbitrators included in the account stated as the basis of their award, various demands not included in the submission, and omitted to include various just demands in favor of the defendants, which were in fact submitted, and that they in several instances made the said Stephen's estate debtor to the plaintiff twice for one and the same thing; without showing what charges and demands were thus allowed, or disallowed, or twice allowed. This is altogether too general and indefinite. The errors alleged should have been stated with a sufficient degree of certainty to enable the Court and the other party to ascertain what particular facts were intended to be put in issue. If this plea were allowed, the whole merits of the award would be opened and be subjected to re-examination *Williams et al.* v. *Paschall's Heirs*, 3 Yeates, 564.

The seventh plea results in an issue of fact.

[1] See *Standish* v. *Parker*, 2 Pick. (2nd ed.) 22, note 3; *Bridge* v. *Gray*, 14 Pick. 55; *Bixby* v. *Whitney*, 5 Greenl. R. 192.

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The eighth plea is *nil debet*, and is, we think, clearly good. The general principle is, that this plea is good in an action of debt, unless the action is founded on a deed or record, and the reason why it is not in such case allowed, is because it
276 would refer the validity of the deed or record to the determination of the jury. If therefore the deed or record is but inducement to the action, and matter of fact is the foundation, *nil debet* is a good plea. *Warren* v. *Consett*, 2 Ld. Raym. 1503; *S. C.* 8 Mod. 107. *Nil debet* is a good plea therefore in an action on a foreign judgment,[1] because it is not founded on a record, and to debt on simple contract not under seal. Com. Dig. *Pleader*, 2 *W* 17. So *nil debet* is a good plea in debt for an escape, for the commitment is only inducement. Also in debt against an executor or administrator upon a *devastavit* after judgment against him, though mixed with record, because the record is only inducement. 1 Saund. 219. So in debt for the arrears of a rent charge devised for life; for the will is no specialty. Hard. 332. So in debt upon an arbitrament, the defendant, says Lord *Coke*, may wage his law, because the *debet* and *detinet* is the ground of the action. So in the case of *Wills* v. *Maccarmick*, 2 Wils. 148, cited by the plaintiff's counsel, *nil debet* was pleaded to debt on an award, and it was not questioned that the plea was good, although it was ruled that the partiality of the arbitrators could not be given in evidence in avoidance of the award: nor could it in England be pleaded, according to the authorities already cited. Upon the whole, therefore, it is very clear that this plea is good, and that on this, as well as on the fifth plea, the defendants are entitled to judgment.

[1] See *Hall* v. *Williams*, *ante*, 247, note 3.

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JOSEPH SEWALL *et al. versus* LAWSON VALENTINE.

The statute of limitations respecting suits against an executor or administrator begins to run from the time of the defendant's accepting the trust, and not from the time of giving public notice of his acceptance.

In pleading this statute, it is sufficient for the defendant to allege that he posted up notifications of his appointment "in two public places in the town," &c. without specifying the places.

In such plea it is sufficient to allege generally, that the defendant gave a bond to the judge of probate for the faithful administration of the estate of the deceased, according to the form of law in that behalf provided, without setting out the bond.

ASSUMPSIT against the defendant as administrator of the estate of Samuel Valentine, junior The action was commenced on the *seventh* day of March, 1827.

The defendant pleaded, "that more than four years next 277
before the commencement of this suit, to wit, on the *fourth* day of March, 1823, at a Probate Court then held at Cambridge, &c. he was by the judge of probate of the county of Middlesex, appointed administrator, &c. and then and there accepted that trust, and then and there gave bonds to the said judge, with two sufficient sureties, conditioned for his the said Lawson's faithful administration of the said goods and estate of the said Samuel, according to the form of the law in that behalf provided, all which by the records thereof in the said Court of Probate remaining appears;" that the judge directed him to give public notice of his appointment to and acceptance of the trust by posting notifications, &c. and "that afterwards and within three months from the time of his said appointment to and acceptance of said trust and also within three months from the time of making said order or direction by said judge as aforesaid, he did, in pursuance of the statute, &c. and of such direction, &c. at Hopkinton, &c. to wit, on the fifteenth day of said March, make known his appointment to and acceptance of said trust, and give notice thereof, as the law requires, by posting up two notifications *in two public places* in said Hopkinton in the form following, &c. and by inserting a notification in the form aforesaid, three weeks successively in the newspaper printed at Boston by Benjamin Russell, to wit," &c. (specifying the newspapers published on the *eighth*, fifteenth

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and twenty-second of March,) "and made return thereof on oath to the said probate office within seven months from said fourth day of March, to wit, on the eighth day of April," &c

The plaintiffs demurred specially, assigning for causes of demurrer: — 1. That the plea does not aver, that when this suit was commenced, the term of four years had elapsed from the time when the defendant *gave notice* of his appointment as administrator: — 2. That it does not state in what public places in Hopkinton the two notifications were posted up: — and 3. That it does not set forth the form of the bond given by the defendant as administrator.

278 *March 29th.*

Hubbard and *Sewall*, in support of the first cause of demurrer, referred to *St.* 1788, *c.* 66, § 3, which requires a suit against an executor or administrator to be commenced "within the term of three years next following *his giving bond* for the faithful discharge of his trust," and to *St.* 1791, *c.* 28, § 2, which provides that the suit shall be commenced "within the term of four years from the time of *his accepting* that trust;" and they contended, that as to creditors, the time of acceptance is the time when notice of it is given, so that they may present their claims against the estate of the deceased. From *obiter dicta* in our reports it should seem that this has been the practical construction of the statute. *Ex parte Allen*, 15 Mass. R. 61; *Dawes* v. *Shed*, ibid. 8; *Rogers* v. *Goodwin*, 2 Mass. R. 475.

2. The places in which the notifications were posted up should be stated with certainty, and not in general terms; in order that it may be determined whether they are public places As the plea now stands, it throws the burden on the plaintiff of ascertaining where the notifications were posted up, (a fact which is within the knowledge of the defendant and should properly come from him,) and of replying that they were posted up in this and that particular place, and that these were not public places. *Willington* v. *Stearns*, 1 Pick. 497; *Slade* v. *Drake*, Hob. 295; 1 Chit. Pl. 240; Com. Dig. *Pleader*, *C* 22, *E* 5; *Oystead* v. *Shed*, 12 Mass. R. 506; *Spear* v. *Bicknell*, 5 Mass. R. 125; 1 Saund. 49; *Halsey* v. *Carpenter*, Cro. Jac. 359; 1 Saund. 117, note 1; *Amory* v. *Williams*, 14 Mass. R. 20; *Eddy* v. *Knap*, 2 Mass. R

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154; *Whitman* v. *Tyler*, 8 Mass. R. 284; *Tate* v. *Anderson*, 9 Mass. R. 92; *Davis* v. *Maynard*, ibid. 242; *Lancaster* v. *Pope*, 1 Mass. R. 86; *Service* v. *Hermance*, 2 Johns. R. 96; *Currie* v. *Henry*, ibid. 433; *Cruger* v. *Cropsey*, 3 Johns. R. 242; *Frary* v. *Dakin*, 7 Johns. R. 75. Sewall v. Valentine.

3. The defendant must show that he gave a legal bond, and the question of legality should be submitted to the court by setting out the bond. See Bac. Abr. *Pleas, &c. I* 3, and some of the authorities before cited.

Osgood, *contrà*, in regard to the first point, relied upon the phraseology of the statute of 1791. He cited also *Heard* v. *Meader*, 1 Greenl. 156; *Scott* v. *Hancock*, 13 Mass. R. 162. 279

PARKER C. J. delivered the opinion of the Court. As to the first cause of demurrer, *viz.* that the defendant has alleged that the action was not commenced until four years next after his acceptance of the trust of administrator, instead of alleging that it was not until four years next after he gave notice in the manner pointed out in the statute, we think the allegation is right. The words of the statute of 1788, *c.* 66, are explicit, that the time of limitation shall run from the giving bond in the probate office. And the statute of 1791, *c.* 28, is equally explicit, that the time shall run from the acceptance of the trust [See Revised Stat. *c.* 66, § 3.] *June 21st*

In the case of *Ex parte Allen*, 15 Mass. R. 61, it is said cursorily, that the suit should be commenced in four years from the time of giving notice; but the construction of the statute was not then in question, and very probably the remark was made without looking at the statute, for the point was wholly immaterial in that case. The words of the statute are too clear to require or admit of explanation.

As to the second cause of demurrer, to wit, that the plea does not aver at what places in Hopkinton the advertisements were posted up, but only that they were posted in two public places in that town, we think the averment sufficient. The defendant might have denied that they were so posted, and then on issue, the fact whether the places were public or not, would have appeared in evidence. It has not been the practice to plead a defence of this kind so minutely; but it has

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been thought sufficient to aver that the defendant was duly appointed administrator, and gave bonds and notice according to law. This plea contains all and a great deal more than is usual.[1]

In the case of *Brown* v. *Anderson*, 13 Mass. R. 201, the plea is general, and not objected to on that ground. In 1 Greenl. 156, the plea is of the same kind, and such has been the general practice. So much strictness as is required in an
280 officer's return on the sale of property, is not necessary, for the party interested may generally learn at the probate office in what manner notice has been given; and there is also another form of notice in the newspapers, from which it may be presumed he obtained knowledge of the fact.

And as to not setting out the form of the bond in the plea, which is the third cause of demurrer, it has never been required and would be useless, for the bond is on file in the probate office, and, if not pursuant to law, the defendant may avail himself of the defect by denying that such bond as the law requires was given.

Leave to withdraw the demurrer on terms.

James Young *versus* Samuel Austin *et al.*

The defendant, having sold to one G, at a certain price per ton, a large pile of slate to be paid for as parcels of it should from time to time be taken away, and G having paid the price of 14 tons, it was *held* that he was entitled to have that quantity weighed off and separated for him, but that until such separation he had no property in any specific 14 tons and could not maintain trover therefor.

G having after such payment sold 14 tons to the plaintiff and given him an order therefor upon the defendants, made a settlement with the defendants before they had notice of the transfer, giving his note for the balance due on his contract, with a memorandum that when paid, the residue of the slate was to be delivered. After this the plaintiff presented the order, which the defendants refused to accept. It was held that he had no property in the 14 tons of slate.

Trover for 14 tons of imperial slate. A trial was had before *Parker* C. J.

It appeared that 176 tons, 4 cwt. of slate being consigned

[1] See *Burditt* v. *Grew*, 8 Pick. 112.

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to the defendants for sale and being piled together on Liverpool wharf, they on the 29th of August 1826 made an agreement with one Galbraith, that they (the defendants) should take 70 tons from the pile, and that the residue should be sold to Galbraith at 30 dollars a ton, to be paid for by him as taken away, one half to be taken away within three months and the other half within four months. The sum of 250 dollars was paid as earnest money. Previous to the 23d of November the defendants had separated the 70 tons reserved as above mentioned.

The plaintiff produced a receipt signed by the defendants, dated November 23d, for 420 dollars received of Galbraith on account of a sale of slate to him according to the agreement of the 29th of August. He also produced a bill of parcels dated November 23d, signed by Galbraith, purporting to convey to the plaintiff the same quantity of slate (14 tons) for the same sum of 420 dollars, and acknowledging the receipt of that sum. That he paid the money to Galbraith on the 23d of November, was not contested; and he proved that Galbraith, in the afternoon of the same day, made a symbolical delivery to him of the 14 tons. When the payment of the 420 dollars was made by Galbraith to the defendants, it was agreed that at 2 o'clock of the same day the 14 tons should be delivered to him, and at that time he and a clerk of the defendants, who was ordered to procure a weigher and have the 14 tons weighed and delivered, repaired to the wharf where the slate was in a pile. No weigher appearing, Galbraith wished to have the quantity measured off from the pile, beginning at one end; but the clerk refused to do this, saying it was contrary to his orders. Galbraith then wished him to deliver one slate in lieu of the 14 tons, but this also the clerk refused to do, for the same reason. Galbraith then said that he would call at the defendants' store in a few days and let them know when he should want the slate, and then he would have it weighed off.

On the 1st of December, it being apprehended that Galbraith might not be able to fulfil the contract of August 29th, an estimate was made of the sums paid by him, and he gave his note to the defendants for 607 dollars 62 cents, the balance due according to the contract. All the slate was delivered to

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him except 23 tons, and on his note was the following memorandum: — "When paid, 23 tons of slate to be delivered to Mr. Galbraith."

Some days after the above transaction of December 1st, the plaintiff called at the store of the defendants with an order from Galbraith, and demanded the 14 tons of slate which he had purchased of Galbraith. Austin, one of the defendants,

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answered, that the slate had never become Galbraith's; to which the plaintiff replied, that it was delivered in his presence. This was denied by Austin.

On the foregoing evidence the chief justice directed a verdict for the defendants, subject to the opinion of the whole Court.

March 31st.

Bassett, for the plaintiff. Though by the contract of August 29th the possession of the slate was to be retained by the vendors until they should receive payment, yet the property vested in Galbraith before a delivery; 5 Dane's Abr. 107, 108; 2 Bl. Comm. 448; *Lickbarrow* v. *Mason*, 6 East, 26, note; *Bach* v. *Owen*, 5 T. R. 409; and when any specific portion was paid for, there was in law an executed delivery of such portion. *Whitehouse* v. *Frost*, 12 East, 614; *Hawes* v. *Watson*, 2 Barn. & Cressw. 540; *S. C.* 4 Dowl. & Ryl. 22; *Damon* v. *Osborn*, 1 Pick. 476; *Chapman* v. *Searle*, 3 Pick. 38; *Parks* v. *Hall*, 2 Pick. 213. It will be said on the other side, that something remained to be done by the vendors, the 14 tons not having been weighed off, and so there was no delivery; but the cases in which that principle is applied, relate to stoppage *in transitu* as between vendor and vendee. Here the 14 tons were paid for, and further, the rights of a third person intervened.

The plaintiff was not obliged to give the defendants notice of his purchase, but in fact enough was done to show that Galbraith wanted the 14 tons for a particular purpose, and to put the defendants on inquiry. 2 Fonbl. 151; *Johnson* v. *Bloodgood*, 1 Johns. Cas. 53.

J. T. Austin, *contrà*, cited *Hanson* v. *Meyer*, 6 East, 614; *White* v. *Wilks*, 5 Taunt. 176; *Busk* v. *Davis*, 2 Maule & Selv 397; *Shepley* v. *Davis*, 1 Marshall, 252; *Astey* v *Emery*, 4 Maule & Selw. 262; *Simmons* v. *Swift*, 5 Barn & Cressw. 857.

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Young v. Austin. June 21st.

PARKER C. J. delivered the opinion of the Court. Had Galbraith acquired the absolute property in any specific quantity of the slate, so that his sale to Young passed the property without any act of transfer by the defendants ?

The writing of the 29th of August, 1826, is evidence of a contract of sale executory, depending upon a condition precedent to be performed by Galbraith, *viz.* payment of the price, and requiring a separation of so much as should be paid for from the common stock, which would remain the property of the defendants.

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By the writing Austin *agrees to sell* 106 tons, 4 cwt., of slate ; it *is to be sold* and *to be paid* for by Galbraith as taken away.

On the 23d of November, 1826, the defendants received from Galbraith 420 dollars, which they say is on account of a sale of slate to him as per agreement of the 29th of August. This entitled Galbraith to so many tons of the slate as according to the stipulated price by the first agreement would amount to that sum, and gave him a right to have it *weighed off* and separated for him, but did not give him the property in any specific 14 tons without such separation ; and so it was understood by the parties, for it is proved, that at the time of the payment it was agreed there should be a delivery of 14 tons, and the clerk was ordered to weigh it off, and at the time the clerk and Galbraith went to the place where the slate was piled, but no weigher appearing, no slate was weighed off and none was delivered. Admitting that Galbraith might then have proceeded to separate 14 tons from the mass and take it into his possession, he did not do it ; on the contrary, it was proved that he waived any such right, for after attempting to persuade the clerk to let him measure it off or to give him a symbolical delivery, which was refused because contrary to the orders of the clerk, Galbraith said he would call at the defendants' store in a few days, and would let them know when he should want the slate, and *then would have it weighed off*. So that the contract still remained executory, being incomplete as a sale for want of delivery : a delivery, or at least the ascertaining by weight the quantity to be delivered, being essential to the acquisition of absolute property in Galbraith.

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It is not like the case of *Damon* v. *Osborn*, 1 Pick. 476. for there the contract of sale was considered executed by a delivery of 800 out of the 12,000 bricks which were the subject of the sale. So in this case, if part of the slate had been
284 delivered, or if there had been, as Galbraith requested, a symbolical delivery, the sale might have been considered complete, and perhaps trover would have lain for Galbraith, or for the plaintiff to whom he had transferred; but nothing having been done, the contract remained executory, and the transfer was only of a chose in action, which would not bind the defendants to their prejudice without notice of its existence.

The strongest case cited by the plaintiff's counsel to show that the property of the slate vested in him, is that of *Whitehouse* v. *Frost et al.* 12 East, 614. Indeed that case, if held to be law, would come very near to settling this, though there was a circumstance in it of some importance, which does not exist here. A, owner of 40 tons of oil in a cistern, sold 10 tons to B. B sold the same to C and gave him an order on A for the 10 tons, *which order was accepted by A.* It was held that C might maintain trover for the 10 tons, though it never had been drawn off or separated from the 40 tons in the cistern. How the court reconciled this with the principle which governs an action of trover, *viz.* that it lies only for a thing certain and specific, does not appear. It was impossible to know which ten gallons of the 40 belonged to the plaintiff. It would seem that drawing off and measuring was necessary to give a distinct property in severalty. This case, decided in the King's Bench, has not been treated with much respect in the Common Pleas. In the case of *White* v. *Wilks*, 5 Taunt. 176, it is expressly denied to be law. There a quantity of oil was sold, being part of a large parcel, and it was holden that a separation from the common mass was essential to the vesting of the property so as to maintain trover. And a like opinion was expressed in regard to the case of *Whitehouse* v. *Frost*, in the case of *Austin* v. *Craven*, 4 Taunt. 645, which was a sale of a part of a quantity of sugar.

We feel authorized then to say, in regard to the case before us, that no part of the slate became the property of Galbraith

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until it was weighed off to him ;[1] and so it seems to have been clearly understood by Galbraith himself, according to the evidence before stated. It was therefore subject to the new contract made on the 1st of December, for no notice had been given to the defendants of the plaintiff's interest, and in this respect the case is not so favorable for the plaintiff as was the case of *Whitehouse* v. *Frost*, for there the original vendor had assented to the second sale by accepting the order drawn by the first in favor of the second vendee. 285

The plaintiff claims title in a specific 14 tons of this slate by purchase from Galbraith ; but he could purchase no more than Galbraith's right, which was to have that quantity weighed off and delivered to him. The actual property still remained in the defendants, subject to the contract of sale executory, and therefore liable to be rescinded by the parties to it, unless the party contracting to sell had notice of a transfer of Galbraith's right to the plaintiff. No such notice was given until the subsequent transaction between Galbraith and the defendants, which transaction was undoubtedly fraudulent on the part of Galbraith towards the plaintiff, if the bargain between them was, as it appears to have been, for a valuable consideration paid by Young.

The plaintiff's receipt and bill of parcels is dated on the same day as the receipt of the defendants to Galbraith for 420 dollars, and it could convey only the interest or right which Galbraith had in the slate, which was to have 14 tons weighed off and delivered to him. In this state of things, on the 1st of December a settlement of the whole transaction respecting the slate is made between Galbraith and the defendants, no information having been given to them of the bargain between Galbraith and the plaintiff, and in this settlement an entire disposition of all the slate is made, credit given for all the money and notes received, and a balance found due to the defendants of 607 dollars 62 cents, on which a memorandum was made at

[1] See *Merrill* v. *Hunnewell*, 13 Pick. 215, 216; 2 Kent's Comm. (3d ed.) 503, 504, 546; *Simmons* v. *Smith*, 5 Barn. & Cressw. 857; *Rhode* v. *Thwaites*, 9 Dowl. & Ryl. 293; 6 Barn. & Cressw. 688; *Ward* v. *Shaw*, 7 Wendell, 404; *Johnson* v. *Hunt*, 11 Wendell, 138, 139; *Riddle* v. *Varnum*, 20 Pick. 280; *Rapelye* v. *Mackie*, 6 Cowen, 260.

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the time, that 23 tons of slate, which was all that remained, was to be delivered when this note was paid off. The sum of 420 dollars, paid on the 23d of November, which entitled Galbraith to the delivery of 14 tons of slate, was credited to him in this settlement. We think it clear that the defendants have a right to retain the 23 tons left as a security for
286 Galbraith's note. They had never parted with the possession; they did not know that he had sold to the plaintiff; there was not an absolute sale of the 14 tons; they have received nothing for it, for the money has been restored; and it is fit that the plaintiff, who trusted to the personal credit of Galbraith, should suffer the loss, rather than the defendants, who held upon the property.[1]

Judgment according to verdict

JOSHUA BLAKE *versus* SAMUEL WILLIAMS, Principal, and JOSIAH MARSHALL, Trustee.

An assignment by commissioners of bankruptcy in a foreign country, does not operate a legal transfer of the bankrupt's property in this State, as against a creditor of the bankrupt.

Thus, where W, a banker in England, having advanced money to pay a bill of exchange drawn upon him by M, a citizen of this State, became a bankrupt, and after an assignment of his effects by commissioners of bankruptcy, but before notice of it had reached this country, the debt due from M, (he not having remitted funds to replace the money advanced,) was attached in his hands by virtue of our trustee process, by B, a citizen of this State and a creditor of the bankrupt, the attachment was held valid as against the assignment.

Whether an assignment made by the bankrupt himself to the same assignees and for the same purposes, of his property here, would be valid against a subsequent attachment under the trustee process, *quære*.

THE question in this case was whether Marshall, who had been summoned as a debtor of Williams on the 3d of December, 1825, should be adjudged the trustee of Williams, the principal defendant, and held liable to pay over to the plaintiff the amount of the debt acknowledged by Marshall in his answer to be due from him to Williams.

[1] See *Parks* v. *Hall*, 2 Pick. 212; *Barrett* v. *Pritchard*, 2 Pick. 515; *Dixon* v. *Yates*, 5 Barn. & Adol. 313

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The debt arose on account of a draft drawn by Marshall on Williams, which was paid by funds advanced by Williams, and Marshall had not, at the time of being served with the process in this case, replaced the amount by remittance to Williams. It was disclosed in the trustee's answer, that a commission of bankruptcy had issued against Williams in England, where he resided and had long been established as a banker, on the 27th of October, 1825, in consequence of an act of bankruptcy previously committed by him; and in pursuance of the commission so issued, the commissioners of bankruptcy, under the English bankrupt law, proceeded to assign over to the assignees, all the property of Williams, including the debts due to him. It appeared from the answer of the supposed trustee, that he had received no formal notice of the assignment by the commissioners in England, at the time of his being summoned, but that such notice was however subsequently given; and the assignees, by a person authorized by them for this purpose, had demanded of him that he should pay over to them the amount of the debt due from him to Williams. 287

The case was argued in writing.

W. H. Gardiner, for the plaintiff, contended that in America, whether colonial or independent, from 1762 to the present time, it had been uniformly and repeatedly held by every court (*except one*) which had given an opinion on the subject, that attachments similar to the present are valid, even where a commission of bankruptcy had issued in Great Britain, and an assignment had been made under it, previously to the attachment of the debt in this country. The opinion of Chancellor *Kent* in *Holmes* v. *Remsen*, 4 Johns. Ch. R. 46, (see also 20 Johns. R. 229,) must be considered as standing alone against the express decisions in the Supreme Courts of the United States, S. Carolina, Connecticut, and Pennsylvania, and the long settled practice in Virginia, Maryland, and Rhode Island, with the strongest intimations of concurrence in the doctrine in the Supreme Courts of New York and Massachusetts. *Bird* v. *Pierpont*, 1 Johns. R. 118; *Van Raugh* v. *Van Arsdaln*, 3 Caines's R. 154; *Proctor* v. *Moore*, 1 Mass. R. 198; *Baker* v. *Wheaton*, 5 Mass. R. 509; *Watson* v. *Bourne*, 10 Mass. R. 337; *Ingraham* v. *Geyer*, 13 Mass. R. 146;

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and *Walker* v. *Hill*, 17 Mass. R. 383. That the doctrine has been expressly adopted, appears from the following cases, statutes and authorities. Stat. Maryland, A. D. 1704, *c.* 29; 1753, *c.* 36; 4 Harris & M'Henry, 331; *Richards* v. *Hudson*, (a Virginia case,) cited 4 T. R. 187; an anonymous Virginia case cited in *Waring* v. *Knight*, 1 Cooke's Bankr. Law, 307; *Burk* v. *M'Clain*, 1 Har. & M'Hen. 236; *Mawdesley* v. *Parke*, (a Rhode Island case,) cited in *Sill* v. *Worswick*, 1 H. Bl. 680; *Jones* v. *Blanchard*, cited in *Topham* v. *Chapman*, 1 S. Car. R. 285; *Ex parte Blakes*, 1 Coxe, 398; *Taylor* v. *Geary*, Kirby, 313; *Wallace* v. *Patterson*, 2 Har. & M'Hen. 463; *Ex parte Franks*, 1 Cooke's Bankr. L. 336; *Phillips* v. *Hunter*, 2 H. Bl. 402; *Ward* v. *Morris*, 4 Har. & M'Hen. 330; *Smith* v. *Smith*, 2 Johns. R. 235; *Bird* v. *Caritat*, 2 Johns. R. 342; *Goodwin* v. *Jones*, 3 Mass. R. 514; *Harrison* v. *Sterry et al.* Bee, 244; *S. C.* 5 Cranch, 289; *Dawes* v. *Boylston*, 9 Mass. R. 337; *Milne* v. *Moreton*, 6 Binney, 353; *Blanchard* v. *Russell*, 13 Mass. R. 1; *Dawes* v. *Head*, 3 Pick 128; and *Ogden* v. *Saunders*, 12 Wheat. 213.

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On the other hand, if we look at the British decisions, we find, that, from 1749 to the present day, it has been uniformly held by the English common law courts, that a creditor who has obtained a priority by legal process abroad, could not be compelled to refund to the assignees, unless he was an Englishman acting in fraud of the laws by which he was bound. *Chevalier* v. *Lynch*, 1 Doug. 170; *Sill* v. *Worswick*, 1 H Bl. 665; *Hunter* v. *Potts*, 4 T. R. 182; *Phillips* v. *Hunter*, 2 H. Bl. 402; *Hovil* v. *Browning*, 7 East, 154. Upon the same principle it has been held, that an English creditor suing upon an English contract, should not be barred by a foreign discharge. *Smith* v. *Buchanan*, 1 East, 6. See also *Cleve* v. *Mills*, 1 Cooke's B. L. 303; *Waring* v. *Knight*, ibid. 307; and *Richards* v. *Hudson*, 4 T. R. 187 In chancery we find it held, that a foreigner is entitled to the priority which he obtains abroad; *Mawdesley* v. *Parke*, 1 H. Bl. 680; but the court would not permit him to prove his debt under a commission of bankruptcy without first relinquishing his attachment; *Wilson's Case*, stated by Lord *Mansfield*

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in *Cleve* v. *Mills*, 1 Cooke's Bankr. L. 303, in *Waring* v. *Knight*, ibid. 308, and in *Chevalier* v. *Lynch*, 1 Doug. 170; or to hold what he had got if he were an English creditor, and within the jurisdiction of the court; *M'Intosh* v. *Ogilvie*, 4 T. R. 193; but the court would not interfere to defeat priorities obtained by English creditors and perfected by judgment abroad, if they had proceeded *bonâ fide*, and without any intention of violating the bankrupt laws of England. *Ex parte d'Obree*, and *Ex parte Le Mesurier*, 8 Ves. jun. 82. 289

The other British authorities on the subject are *Ogilvie's Case*, in Scotland, cited 2 Dow, 236; *M'Intosh* v. *Ogilvie*, in Chan. *temp. Hardw.* cited 4 T. R. 193; and more fully reported 3 Swanton, 366; *Assignees of Wilson* v. *Fairholme*, in Scotland, cited 2 Dow, 237; *Crawford* v. *Brown*, Scotch case, cited 2 Dow, 237; *Solomons* v. *Ross*, cited 1 H. Bl. 131; *Neal* v. *Cottingham*, cited 1 H. Bl. 132, *in notis*; *Thorold* v. *Forest*, in Scotland, cited 2 Dow, 237; *Jollet* v. *Deponthieu*, 1 H. Bl. 132, note; *Balantine* v. *Goulding*, 1 Cooke's B. L. 515; *Ex parte Frank*, 1 Cooke's B. L. 336; *Quin* v. *Keefe*, 2 H. Bl. 553; *Davison* v. *Fraser*, in Scotland, 2 Dow, 237; *Pedder* v. *M'Master*, 8 T. R. 609; *Smith* v. *Buchanan*, 1 East, 6; *Strothers* v. *Reid*, in Scotland, stated 2 Dow, 237; *Potter* v. *Brown*, 5 East, 124; *Bank of Scotland* v. *Cathbert*, in Scotland, stated 1 Rose's Cases in Bankruptcy, App. 462; *Selkrig* v. *Davies*, 2 Rose, 291; *S. C.* 2 Dow, 230; *Ex parte Cridland*, 3 Ves. & Beam. 94; and *Birchwood* v. *Miller*, 3 Meriv. 279.

Considering the intimate connexion of England, Ireland and Scotland, their concurrent decision, that no legal process shall enable any subject to obtain a priority over other creditors, in contravention of each other's bankrupt laws, can be no rule of decision for other countries.

The reasoning of Chancellor *Kent* in the case of *Holmes* v. *Remsen*, the only American authority opposed to us, is elaborately examined and answered by the counsel and judges in the case between the same parties in the Supreme Court of New York, 20 Johns. R. 229. The passages in Huberus and Heineccius, cited as authorities to prove a rule of national law, that the succession to personal property, wherever situat-

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ed, is to be regulated by the domicile of the owner, are, according to Huberus, subject to the limitation, that its adoption in any country must be *sine suo suorumque prejudicio*. Chancellor *Kent* says, elsewhere, that "comity is to be observed

290 *quatenus sine prejudicio indulgentium fieri potest*; and it certainly would be to the prejudice of our citizens to relinquish attachments, in favor of foreigners, which would be valid against our own citizens. Huberus lays down the rule, that the laws of a state administered within its own territory are valid everywhere, *quatenus nihil potestati aut juri alterius imperantis ejusque civium prejudicetur*. Huber. *part.* 2, *lib.* 1, *tit.* 3, De Confl. Leg. § 2. He puts as one example of such prejudice, the case of a marriage contract made in Holland, with an agreement, that the wife should not be liable for her husband's debts. Such a stipulation is valid *there*, without public notice; in the neighbouring province of Friesland it is void if not published. The husband becomes indebted in Friesland; it is considered that the wife is liable for half the debt, according to the laws of Friesland. Ibid. § 11.

The counsel for the plaintiff then went into a particular examination and comparison of the British and Scotch cases already cited. He maintained that the rule of comity could, in this case, at the most, extend only to countries which had similar bankrupt laws, as Holland and England, or France and England; *Parish* v. *Sevon*, Cooper's Bankr. L. App. *p.* 27; and no such reciprocity could take place between England and this State, as we have no similar bankrupt law.

It is admitted by Chancellor *Kent*, that "in all cases every country may regulate, as it pleases, the disposition of personal property found within it, and may prefer its own attaching creditors to any foreign assignee, and no authority has a right to question the determination." The assignment under the English bankrupt law, has not been admitted in Scotland, until very recently, to supersede the previous arrestment of a debt in Scotland by a Scotch creditor. That the adoption of any such rule between independent nations is a matter of stipulation, or, in the language of *Platt* J., of "mere comity and not of international law," appears from the treaties of the United States with France, 1778, *art.* 11, — the Netherlands, 1782,

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art. 6, — Sweden, 1783, *art.* 6, — Prussia, 1785, *art.* 10, — Spain, 1795, *art.* 11, (1 U. S. Laws, *ed.* 1815, *p.* 80, 153, 179, 232, 269.) See also Poth. Des Successions, *c.* 1, *art.* 1, — *c.* 18, *art.* 2, 1.

One reason given for this rule of the universal operation of the assignment in foreign countries, is, that "the assignment is equivalent to the voluntary act of the party over his own property," and to this point are cited Lord *Mansfield*, in *Wadham* v. *Marlow*, 1 H. Bl. 437, note, 8 East, 314, and *Parsons* C. J. in *Goodwin* v. *Jones*, 3 Mass. R. 517. See also *Cleve* v. *Mills*, *Bird* v. *Pierpont*, and *Bird* v. *Caritat*, *ubi supra*. On examining the cases, it appears that the expressions having this import, are used in relation to questions arising between the bankrupt, and the assignees or creditors subject to the same jurisdiction, in which cases the assignment by the commissioners is no doubt equivalent to an assignment by the party himself. It appears from *Wadham* v. *Marlow*, that Lord *Mansfield*, did not admit the reason given by *Parsons* C. J. in *Goodwin* v. *Jones*, for considering the assignment a voluntary act of the bankrupt, namely, that he voluntarily committed an act of bankruptcy; for the commissioners' assignment, in virtue of the act of parliament, is the immediate cause of devesting the estate out of the bankrupt. To take the instance put by *Platt* J., the bankrupt no more transfers his property by an act of bankruptcy, than does the traitor by an act of treason. It is in each case *the law*, which, when the fact has been proved, seizes and disposes of the estate; and the bankrupt assents to being stripped of his substance, no otherwise than the traitor does to being hanged. Such assent is a mere presumption or fiction of law. To make the commissioners' assignment equivalent to that of the party, so as to pass the property lying in another jurisdiction, there must be a consideration cognizable by the law of the country where the property is. *Ingraham* v *Geyer*, 13 Mass. R. 146. The only *valuable* consideration for the assignment is the bankrupt's discharge, but this is not contemporaneous with the assignment, or necessarily consequent upon it. Whether it will ever happen is entirely contingent, and when the certificate is granted, it is no bar in a foreign country. *Ogden* v. *Saunders* and other cases *supra*.

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It is said that a payment of debts is a sufficient consideration to support a conveyance, but this supposes a free act on the part of the debtor, and an assent on the part of the creditors. In the case of bankruptcy, the bankrupt does not give his assent, and it is altogether uncertain at the time of the assignment, whether the creditor will give his. The assignment is made in trust for the creditors, who may or may not assent to it, and it therefore stands upon the same footing as an assignment in this State for the same purpose, which is held not to be valid against attachments made before the creditors give their assent. See *Widgery* v. *Haskell*, 5 Mass. R. 154; *Ingraham* v. *Geyer*, 13 Mass. R. 146; *Marston* v. *Coburn*, 17 Mass. R. 454. It follows that there is in this case no consideration cognizable by our laws.

It is a general rule or fiction of law, that personal property is attached to the person of the owner, and governed by the laws of the place of his domicile. But this rule is subject to limitations and exceptions. One of these exceptions is the rule, that the *lex rei sitæ* regulates the legal remedy. *Blanchard* v. *Russell*, 13 Mass. R. 5, 6.

The giving effect, in this country, to the foreign assignment, is also put upon the ground of the *comity* of nations, which is manifestly not a matter of obligation, but merely of discretion and sound policy. The English courts have gone upon this principle; as they give credit to all nations and owe none, the rule of comity, in this case, is for their advantage. The same motives of policy, in their particular case, have influenced the Scotch decisions, and produced their "distressing versatility" complained of by Lord *Eldon*. They began with asserting the supremacy of the law of Scotland, and end with admitting the force of the English bankrupt law to be the same in Scotland as in England. The courts naturally fluctuated between the old and new decisions, and hence the versatility complained of.

In the colonies, where there were no bankrupt laws, the same principle of policy led to the adoption of a different rule. It was thought that it would be a great hardship upon their traders, to send them to England to collect their debts against English bankrupts, when they had the means of paying them-

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selves at home. The attachment of the bankrupt's property here, was therefore held to be valid against an assignment under a foreign bankrupt law. And we imagine the policy of this country is still the same; for so long at least as we have no bankrupt law, the rule of comity is not, as between us and England, a rule of reciprocity. Besides, we doubt very much whether courts of law can, to any great extent, be governed by motives of national policy; especially in a country like ours, where the legislative, executive and judicial powers are so entirely distinct. The question seems to belong to the legislature, and not to the courts. If considerations of national policy are to be introduced in any case into the judicial administration, the courts of the United States seem to be the only legitimate organs for the application of this policy; the States have no external policy or relations. The Supreme Court of the United States has expressly declared an opinion against the admission of the force of assignments under foreign bankrupt laws, in this country, to the prejudice of our citizens. *Harrison* v. *Sterry*, *Ogden* v. *Saunders*, *ubi supra*.

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It is to be considered further, in estimating the weight of the authority of *Holmes* v. *Remsen*, before Chancellor *Kent*, that it was a case in a court of chancery, which might, perhaps, introduce considerations of comity and national policy to a much greater extent than is admissible in a court of law. It is another distinguishing circumstance of that case, that it was not, like the present, a question between a domestic attaching creditor and the assignees under a foreign bankrupt law; it was whether the right of distributing the same fund, to the same persons, and precisely in the same way, should be exercised by one set of trustees in Great Britain, who had already got possession of the fund, or another set of trustees subsequently appointed under the laws of New York, who were attempting to get the fund into their hands by a most inequitable suit. Nothing therefore appears from that suit that would warrant the conclusion, that the same judge, before whom the question was brought in the court of chancery in New York, would, sitting as a judge in Massachusetts, postpone the operation of our attachment laws, to let in an assignment under a foreign bankrupt law. Another distinction be-

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tween a case in New York and Massachusetts, is, that there is no law in the former authorizing an attachment for the exclusive benefit of the attaching creditor. Another distinction between the case of *Holmes* v. *Remsen*, and the one before the Court, is, that in *Holmes* v. *Remsen* the bankrupt in England had made an assignment of the property in question in his own name to the assignees; whereas in the case before the Court, Williams has made no assignment himself, as auxiliary to that made by the commissioners under the English bankrupt act. Such an auxiliary assignment was also made in the case of *Dawes, Judge*, v. *Boylston*, 9 Mass. R. 338.

If this case had related to the assignment of a chattel, it cannot be denied that the chattel would have been attachable under our laws, at the suit of any creditor, until a delivery should have been made to the assignees, in pursuance of the assignment, even if the assignment had been made by the bankrupt himself. *Lanfear* v. *Sumner*, 17 Mass. R. 110. Yet chattels are held to follow the person of the owner, and to be subject to the laws of the domicile, as much as choses in action.

Shaw and *Aylwin*, for the trustee, contended, that he ought to be discharged, because the debt to Williams was payable in London, and not in this country; and to oblige the trustee to pay it in this country, would be obliging him to do that, in favor of an attaching creditor, which he was not bound to do for the principal. To render a debtor to the principal liable as trustee, the principal must have a cause of action. *Maine F. & M. Ins. Co.* v. *Weeks*, 7 Mass. R. 438. If by the express or implied agreement, Marshall was to pay the debt in England, there could be no cause of action until there had been a breach of that agreement by a failure to remit or otherwise. It does not appear by the answer of the trustee, that there had been any failure on his part to repay the sum advanced by Williams in the manner understood between them, and conformably to the usual course of dealings; and so there was no cause of action by Williams against him. *Clark* v. *Moody*, 17 Mass. R. 145.

295 Another ground on which the trustee claims to be discharged, is, that the assignees have a better right to claim and

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hold the debt than the attaching creditor. The debt attached was contracted with an individual subject to the English bankrupt laws, and arose from transactions at his domicile, and became payable in that kingdom, and on general principles, would seem to be subject to the same laws, which controlled his own actions, and governed the rest of his property. The debtor must be presumed to have contracted with reference to the laws of the place where the contract was to be performed.

It is a rule that a debt is attached to the person of the creditor, like other personal property. This results from the general law of property, which recognises the absolute dominion of its owner. The rule is a law of nature and one of the foundations of the common law, and St. Germain states that, in his time, "it was generally kept in all countries." Dr. and Stud. *Dial.* 1, *c.* 5.

The acquisition and transmission of property, are acknowledged to be generally subject to the law of that political society of which the owner is a member; and the mutual convenience of intercourse among civilized nations, requires that they should not only be so considered by them, but be regarded as forming a part of that general code of equitable and conventional rules, which we term the law of nations. Thus Vattel lays it down, that "the goods, even of individuals, ought to be considered as the goods of the nation, in regard to other States. They, in some measure, really belong to it, from the right it has over the goods of its citizens, because they constitute a part of the sum total of its riches, and because a nation has an interest in the protection of its members." Vattel, *bk.* 2, *c.* 7, § 81. This absolute dominion of the owner over his property, is only limited by the laws to which he gives his express or implied assent.

It is accordingly the established rule of civilized countries, to admit the authority of the law of the domicile, in regard to the personal property of the owner. *Somerville* v. *Somerville*, 5 Ves. jun. 760. At his death, as Vattel asserts, *bk.* 2, *c.* 8, 296
§ 110, (and other writers concur with him, 2 Huber. *lib.* 1, *tit.* 3, § 15,) what he leaves ought to devolve on those who are his heirs, according to the law of the state of which he was a member. The right of bequeathing by will, has been held

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to be a natural right. *Desesbats* v. *Berquiers*, 1 Binney, 336 The contract of matrimony and its incidents, are governed by the same rule. See authorities cited by *Law* in *Hunter* v. *Potts*, 4 T. R. 184. The only qualification or restriction made by writers on public law, is, that this rule cannot reach lands or immovable property, since it might endanger the sovereignty of the country. No distinction is anywhere made between debts and other personal property. When a debtor becomes insolvent, justice dictates that his property should be proportionally distributed among his creditors, and if a law is made to effect this object, what rule of national law is there to interpose and say that this equitable object shall not be carried into effect?

A voluntary sale according to the local law, and made on adequate consideration, would be binding. An equal distribution of the debtor's effects, so far as they will extend in discharge of his debts, is one of the highest considerations. *Marbury* v. *Brooks*, 7 Wheat. 577. See also 11 Wheat. 78; *Holbird* v. *Anderson*, 5 T. R. 235; *Pickstock* v. *Lyster*, 3 Maule & Selw. 371; *The King* v. *Braddock*, 3 Price, 6. If the law of the country, of which he is a member, assumes to act for him, on this consideration, every principle of justice and of national comity requires that we should facilitate its operation. It is objected, that the bankrupt's discharge is the only consideration, and that it is not simultaneous with the assignment. This might be also objected to the *cessio bonorum*, where, as in Holland, it discharges only the person. *Ex parte Burton*, 1 Atk. 255. It is the duty of the debtor to distribute his property proportionally among his creditors, whether they forgive him the remainder or not. The moral obligation in this case forms the consideration; not the ultimate favor which the creditors may grant or withhold. By contracting the debt, the debtor impliedly hypothecates, not only
297 his present means, but his future ability, to a fulfilment of the obligation. The release of this he has no absolute right to stipulate for, nor is the law of his country bound to procure it for him. Whether given or not, it does not enter into the validity of the consideration on which the assignment rests.

It is idle to attempt a distinction between a transfer by the

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individual, and one by the nation, or the laws of the nation, to which he belongs. It would be asserting, in so many words, that we have the right to regulate for other nations, by what terms and upon what conditions the property of their citizens shall be held. It follows that the judge, in the place where the property is found, ought to apply the rule of the domicile, although he is to do it according to the forms of the local law.

But it is said there are exceptions to this rule; and that neither the State nor its citizens ought to suffer by its adoption, and that it ought not to contravene the local law. But in the present case, we are to observe, that the agreement was entered into with an English bankrupt, with reference to the place of his domicile as the place of performance. *Coolidge et al.* v. *Poor et al.* 15 Mass. R. 427. We are then to inquire, whether establishing the validity of the assignment, violates any express rule of our law, or infringes the rights of our citizens. And here we are to distinguish between the doctrines, that the assignment of a bankrupt's property, pursuant to the law of his domicile, ought to operate in respect to the property wherever it is found, — and that a discharge valid by the law of his domicile should be so everywhere. The former of these doctrines is the one we are considering, the latter not being brought in question in the present case; nor are they necessarily dependent upon each other; — the one rests upon the *lex domicilii*, the other upon the *lex loci contractûs* or *lex fori*. Whether the certificate is or is not a good discharge for the debt, if sued here, it has been solemnly settled that the assignment under the bankrupt law does operate here to some purposes. It is so far taken notice of by judicial tribunals as to authorize the assignees to collect the debts due to the bankrupt, when not claimed by creditors, and for this purpose to institute suits and to give a good discharge. If it were a question between the assignees and Williams himself, the assignees would, doubtless, have the more equitable title; and would not the debtor, after notice of the assignment, be restrained from paying over the debt to Williams? *Bird et al.* v. *Caritat*, 2 Johns. R. 342. If so, the question of hardship to the bankrupt does not arise in this case, since the assignment is considered valid as respects him. The notion of hardship is sug

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gested by supposing the certificate of discharge to be the consideration; whereas the equitable distribution of the effects, and the discharge of debts so far as they will go, are the true consideration for the assignment.

The provisions of the English bankrupt acts present nothing contravening the rights of our citizens. They provide that all the property of the bankrupt, real and personal, shall be assigned for the benefit of his creditors, as well those out of England as those in England. 6 *Geo.* 4, *c.* 16, § 46, 59, 63, 64, 107. What law of this State does it contravene? We have no laws like the Maryland statutes of 1704 and 1753, declaring that no assignment made out of the province should be of any force, unless security was given for the payment of all debts of the grantor due within the province; nor any like that of the South Carolina act, referred to by the plaintiff's counsel.

Our trustee laws merely authorize the attachment of the *debtor's* goods. It has been constantly held in this Commonwealth, that an assignment of a chose in action for a good consideration, although not operating, technically speaking, a legal transfer of the debt, yet so far passes the equitable interest, that it is no longer subject to the control of the assignor, or liable to be attached for his debts.

[The counsel then went into a minute and elaborate examination of the British and American cases, to show that the current of authority was not against the validity of the assignment. The cases cited and commented upon, have been already referred to in the abstract of the argument on the part of the plaintiff.]

295 A position is taken by the plaintiff's counsel, that, as the attachment was made here prior to notice, although subsequently to the date of the assignment of this debt, the debt ought to be affected by this lien, in the same manner as other personal property would be, when not reduced to possession. But the difference between *chattels* and *choses in action* is too great to admit of their being governed by the same rules. One is susceptible of possession, the other not. The purchaser of one may have his title defeated, if he neglects to perfect it by possession; the assignee of the other, from its peculiar char

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acter, can manifest his ownership in no other way than by notice, demand, assignment, &c. All that is required of the assignee is to give notice previously to the payment of the debt. *Jones* v. *Witter*, 13 Mass. R. 304; *Chartres et al.* v. *Cairnes et al.* 5 Cowen, 578, note. The defeating of attachments where notice of a previous assignment is given after the attachment, is matter of daily experience.

Gardiner, in reply, went pretty fully into the consideration of the arguments on the other side. His reasoning will be the more briefly stated, as the points are distinctly considered in the opinion of the Court.

It is admitted to be a general rule, that a debt, considered as personal property of the creditor, is attached to his person; that it ought, in general, as to succession and transmission, to be governed by the law of his domicile, and that the judge of the place where the property is found, ought, in general, to be guided by that law in the interpretation of the contract. But it is a qualification of these rules, that debts, in respect to the liability of the debtor, follow *him*, and are subject to the jurisdiction of the law of his domicile; or of the place where his property is situated, against which the process is pending, to enforce the contract. 2 Huber. Præl. Jur. Rom. & Hod. *part.* 2, *lib.* 5, *tit.* 1, *De Foro Comp.* § 38.

From the earliest period of our colonial history, the laws have enabled a domestic creditor to arrest the property of the absent debtor, lying within the territory, and enjoying the protection of the State. Col. & Prov. L. Mass. 614; Rhod. 300
Isl. & Prov. Plant. A. D. 1744, *ed. of Pub. Laws*, 1822, *p.* 169; Laws of N. Hampsh. *ed.* 1815, *p.* 173; Laws of Connect. *ed.* 1808, *p.* 61; Laws of N. York, *N. R. L. vol.* 1, *p.* 157; N. Jersey Laws, *ed.* 1821, *p.* 355; Pennsyl. Laws, see Sergeant on For. Attachm.; Delaware Laws, see Griffith's Law Register, 1069; Maryland, ibid. 944; Virginia, ibid. 363, also 1 Rev. Code, 474, 486; N. Carol. Laws, *p.* 291; Grimke's S. Carol. Laws, *p.* 187, and Brevard's Dig. *p.* 32; Georgia, see Griff. Law Reg. *p.* 446; Louisiana, ibid. 697. This is a branch of the *lex loci rei sitæ*, and as such is respected by the law of nations. For not only the territory, but whatever is in the territory, is under the

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control of the State; which is bound to protect the property of friendly foreigners lying within its jurisdiction, and may, when justice requires, seize it as the property of the foreign State. Voet. ad Pand. *lib.* 2, *tit.* 1, § 46. Thus having the control and jurisdiction of the property, it belongs to the *lex fori* or *rei sitæ*, to regulate the remedy, whereby creditors are let into the possession, or allowed to make disposition, of the property, and to settle the order of payment and rules of preference, which are various, the estates of persons deceased being marshalled in England in the order of judgments, specialties, &c. of which one class must be wholly paid in preference to others, in case of a deficiency of assets. In Spain a similar principle is adopted in relation to the distribution of a bankrupt's effects. In other countries, as with us, no regard is paid to the character of the debt, and the first lien, in favor of whatever species of debt it may be, binds the property. This order or preference it belongs wholly to the *lex fori* to settle. The remedy against the person, as well as the property of the debtor, is regulated by the same law; for it has been repeatedly held, that the exemption of the person or property of the debtor from arrest or attachment upon mesne process or as security, at the place of his domicile where the debt was contracted, does not affect the liability of either his property or person in other countries. If the property is so situated that its transmission requires the intervention of a foreign rem-

311 edy, its transmission must be regulated by the *lex fori*. *Van Reimsdyk* v. *Kane*, 1 Gallison, 376. For the principles and extent of application of this rule, see *Smith* v. *Spinolla*, 2 Johns. R. 198; *Ruggles* v. *Keeler*, 3 Johns. R. 263; *Scoville v. Canfield*, 14 Johns. R. 338; *Whittemore* v. *Adams*, 2 Cowen, 626. See also the Reporter's note to *Andrews* v. *Herriot*, 4 Cowen, 510, for cases on the *lex domicilii*, *fori*, *rei sitæ*, and *loci contractûs*.

A distinction has been made between the assignment of a chattel, and that of a *chose in action*, which is described to be "a bare right to the occupation or use of something, the possession whereof may be recovered by a suit." 2 Bl. Comm. 397. The only operation, therefore, of the law of foreign domicile, is to give the foreign assignee a right to pursue the

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remedy afforded by our law for the recovery of his debt. It is a question exclusively belonging to the *lex fori*. This being the case, an application is made to the *comity* or *discretion* of the court. We are asked, as matter of comity, to permit these assignees to come into our courts, and make use of our laws, to collect the debts due to the bankrupt for the purpose of distributing the proceeds at their own domicile, among such creditors as may be found there to receive them. Our answer is, we will lend them our aid, so far as we can do it without prejudice to our own laws; one rule of which is, that all property within their jurisdiction is liable to be attached at the suit of a creditor of the owner. For this position we have the authority of Chancellor *Kent*, who says, (2 Comm. 329,) "whatever consideration might otherwise have been due to the opinion in *Holmes* v. *Remsen*, and to the reasons and decisions on which it rested, the weight of American authority is decidedly the other way; and it may now be considered *as a part of the settled jurisprudence of this country*, that a prior assignment in bankruptcy under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here."

It is urged by the counsel for the trustee, that this debt is of British origin. It arose on an acceptance and payment of a bill of exchange, some months before the commencement of this suit. That bill was drawn by Marshall in Boston, where, 302
consequently, the liability arose, which is to be governed by the laws of that place. See Bayley on Bills, (Phil. & Sewall's ed.) 28, 29, and cases there cited. In respect to Marshall's liability, this was an American contract. But supposing it to be English, it has no special reference to the bankrupt law of that country. According to the reasoning of Chief Justice *Marshall*, "a statute respecting insolvency, however it may act upon contracts, does not enter into them and form a part of the agreement." *Ogden* v. *Saunders*, 12 Wheat. 343. The same remark is equally applicable to a contract made in a country where a bankrupt law is in force; the contract is not made with a reference to such a law, or in particular contemplation of its provision. Thus a discharge of a contractor in the State where the contract was made, under the insolvent

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laws of that State, has been held not to be a valid discharge in another State, where the party contracted with is a citizen. This effect is limited to laws in particular contemplation of which a contract is made. *Prentiss* v. *Savage*, 13 Mass. R. 20. What is there in a bankrupt law which can make it a subject of particular contemplation with the parties to a contract, any more than a limitation law? The description of bankrupt laws by *Blackstone*, 2 Comm. 477, that they "create no new debts, but only give a speedier and more effectual *remedy* for recovering such as were before due," shows that they have reference to the *lex fori*, rather than the *lex loci contractûs*. They affect the *remedy*.

The liberal provisions of the English bankrupt law, in favor of foreign creditors, have been urged; but it is apparent, that they do not put such creditors upon an equal footing with the domestic creditors. The foreign creditors can have no voice in the appointment of assignees, in substitution for those appointed by the commissioners, as provided for in the 45th section of that law. They can have very little influence in granting or refusing the bankrupt's certificate. And these are not the only disadvantages under which such creditors are placed by this law.

On the whole, we can perceive no motive of policy or expediency, nor any principle of international law, or rule of
303 decision adopted in our courts, which should transfer to foreign tribunals, in the case under consideration, the jurisdiction over the rights of our citizens.

Jun 26th. PARKER C. J. delivered the opinion of the Court. The person summoned as trustee in this case, admits himself to be indebted to Williams, the defendant in the action, but objects to being charged as trustee, on account of the bankruptcy of Williams in England, and the assignment of his estate and effects by the commissioners appointed according to the laws of that country, which assignment he supposes transferred this debt to the assignees, and thus that it is taken out of the operation of our trustee process.

This process was served after the commission of bankruptcy issued, and after the assignment made by the commissioners, but before any notice thereof was given to the plaintiff in the action, or to Marshall, the supposed trustee.

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By our law the service of a trustee process upon one who is indebted to the defendant in the suit, creates a lien upon the debt in favor of the plaintiff in the action; so that if he recovers judgment against the principal, he shall have execution against the trustee to the amount of the effects in his hands, or the debt which he owes, and no distinction is made in the application of this law, between citizens, who may be trustees of other citizens, and those citizens who may be indebted to a person residing in a foreign country, who is indebted to citizens of the United States. Nor is the benefit of the law confined to citizens of the United States; for foreign merchants coming here and finding property or debts of their debtor here, may attach them as our own citizens may. The plaintiff therefore has a right to an adjudication against Marshall as the trustee of Williams, unless the bankruptcy and proceedings under it have transferred this debt to the assignees, so that in effect Marshall was not the debtor of Williams, but of the assignees of Williams, at the time of the service of the writ. In regard to goods and merchandise belonging to a foreign bankrupt or insolvent person found here, if attached before any possession is taken by the assignees, whether under a commission of bankruptcy or otherwise, the attaching creditor 304
would hold, because delivery, either actual or constructive, is necessary to complete the transfer; but in regard to choses in action, as debts due to the bankrupt, the mere assignment, if valid in law, passes the property, because they are incapable of delivery, and notice to the debtor is not essential to the transfer, otherwise than to protect him in case he should pay over to his creditor after the assignment without notice.

This case raises a question which has been treated by various judicial tribunals as of great magnitude, and as of a general and national, rather than a municipal character; and such is the difference of opinion among learned judges and eminent jurists, that it is difficult to affirm where the weight of argument lies. Our duty however does not require us to enter much into the discussion of the general principles which may be supposed to affect the question; we shall rather look for authority, because, if there is a received and settled law upon the subject, we shall feel ourselves bound to observe it, although we might

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think that the improved state of the world in regard to its commercial relations requires a more liberal system than that law sanctions; for it is not for one out of a cluster of States, whose jurisdiction is limited in its objects, to affect to improve its jurisprudence by the introduction of rules supposed to be called for by enlarged policy in regard to objects of a general nature. Such changes, if within judicial power, should be wrought by the supreme court of the nation, and if not, by other constituted authorities of the nation, either by treaty with foreign powers, or by legislative enactment. We must be allowed therefore to discharge ourselves of this case on narrower grounds than its importance, or the very elaborate arguments with which we have been favored, would seem to require.

Does then a commission of bankruptcy in England and an assignment of the bankrupt's effects under it, so transfer a debt due to the bankrupt from a citizen of this State to the assignees, that another citizen who is a creditor of the bankrupt cannot seize it on a trustee process and secure it to himself?

305 We think it very clear that this question has not been settled in the affirmative in this State, nor in any other State in the Union, nor in the Supreme Court of the United States, but on the contrary, that whenever the question has been raised, it has been determined in the negative. With respect to our own State, the question has not been settled either way directly, though there are some cases in which it has incidentally occurred; but from these nothing favorable to such assignments can be inferred.

An expression of Chief Justice *Parsons* in the case of *Goodwin* v. *Jones*, 3 Mass. R. 517, is relied upon. Too much stress is laid upon that expression, considering that it is rather a statement of the argument of counsel which he is undertaking to answer, than an opinion of his own.[1] He says, "It is admitted that the assignee of a bankrupt duly appointed pursuant to the laws of the State where the bankrupt dwells, may maintain an action in that character in any other State, *the*

[1] See Story's Confl. Laws, 345, note 2.

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laws of which are not repugnant to his recovery." Now the very question here is, whether the laws of this State are not repugnant to his recovery; and this cautious qualification of the admission has at least as much bearing as the admission itself. But even if the admission were unqualified, as the question supposed to be involved in it was not before the Court, it could not be received as authority.

The case of *Dawes, Judge*, v. *Boylston*, is cited for the assignees, but if any thing touching the question is to be inferred from that case, it is, that the assignment under a commission of bankruptcy has no effect against the creditors of the bankrupt here. Neither do we see any thing in the case of *Blanchard* v. *Russell*, *Baker* v. *Wheaton*, or *Watson* v. *Bourne*, which sustains the position advanced by the counsel for the assignees, *viz.* that the assignment under a foreign commission of bankruptcy transfers the property and debts of the bankrupt here, so as to prevent an attachment by our creditors. The question in all those cases related only to the effect of a discharge under the laws of the State where the contract was made, upon the demand of a creditor when sued in another State. Observations which might have fallen from judges in the course of the opinions given by them, of a more general 306
nature than the subject required, cannot be considered as authorities. It is the point decided which becomes the precedent; what is said *arguendo* by a judge, ought to have little if any more weight attached to it, than if said by counsel. It would be altogether unjust to give to remarks of the kind the force of judicial decisions. We do not perceive, however, in any of the cases cited, even an intimation that the property of a bankrupt in this country, or his debts here, passes to his assignees in a foreign country by force of the assignment under the commission.

In regard to the case of *Blanchard* v. *Russell*, which has frequently been referred to in the argument of the counsel for the trustees, it should be remarked, that the principal question discussed is the constitutionality of State insolvent laws; whether they so impaired the force and obligation of contracts as to come within the prohibitory clause of the constitution of the United States. It is true, in the opinion delivered, the

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position was attempted to be maintained, that contracts were to be interpreted and construed by the existing laws of the State within which they were made; and also, that what would operate a legal discharge of the contract in that State, would have the same effect elsewhere; and hence it was intimated, that an American citizen, who should become creditor of an English merchant by a contract made in England, might be barred of his debt by a certificate of discharge duly obtained under a regular commission of bankruptcy in England. This position has been questioned, and so far as any judicial decision can be predicated of the case of *Ogden* v. *Saunders*, 12 Wheaton, it may be considered to be overruled; for although in that case the legal effect of a State insolvent law is to a certain extent admitted, yet this effect is limited by the decision to cases between parties who are both citizens of the State where the law is enacted, and to suits brought in the courts of that State.[1] But whether this Court were right or wrong in the position so laid down, it does not follow that assignments of the commissioners would so divest the property of the bankrupt that it would cease to be subject to our attach-
307 ment laws. The case supposed is of a particular creditor, who by reason of the nature and locality of his contract might be deprived of his debt by a plea of a certificate of discharge, upon the ground that he is virtually a party to the commission, leaving untouched the case of an American creditor whose debt was not so situated, and who had, by virtue of our statutes, acquired a lien by attachment, or under the trustee process.

On the other hand, the case of *Ingraham* v. *Geyer*, 13 Mass. R. 147, in quite unambiguous terms asserts the right of an attaching creditor within our jurisdiction, he being a citizen of this State, as paramount to the right of assignees claiming by virtue of a transfer from the debtor himself in another State. This case has been sometimes cited in this Court and elsewhere, as having decided that in all circumstances an attaching creditor here would prevail over the assignee of the debtor under a transfer made abroad; but we

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[1] See *Braynard* v *Marshall*, 8 Pick. 194; *Pitkin* v. *Thompson*, 13 Pick. 64

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do not think it was intended, or that it does in its terms go to that extent. The assignment set up was clearly void according to the law of this State. It was said it was valid in Pennsylvania, where it was made; the Court said, admit it to be so, nevertheless it would not be received here as valid against our citizens, because it was unjust and unequal in its effect upon them. The meaning was, that though by comity the laws of other States, and contracts made under them, are to be received and allowed here, yet this case would come within the acknowledged exception to that general rule, *viz.* that our own citizens should not be prejudiced thereby. It was certainly not intended to decide, that a *bonâ fide* transfer by a debtor abroad to his creditors, or to trustees for their use, in such form as would be valid to pass the property if made within this State, would be set aside for the benefit of creditors who had acquired no lien until after the making of such assignment.[1] And therefore we do not think a decision against the operation of an assignment by commissioners under the bankrupt laws of England, draws after it the inference, that an assignment made by the debtor himself without the intervention of a commission of bankruptcy, if such assignment were lawful in the place where made, would be unavailing.[1] In regard to the intimations given in the case *Dawes, Judge*, v. *Head*, 3 Pick. 128, [2nd. ed. 148, note 1,] which are thought by counsel to be applicable to the case before us, it should be considered that that was a case of insolvency recog nised by our statutes, and for which an equal distribution is provided among the creditors. The desire of the Court was, that the foreign creditors should share in the distribution, instead of applying the whole effects found here to the payment of our own citizens. There was no attachment law to interfere, and the way seemed to be open to introduce a liberal system for the settlement of estates of deceased insolvent persons; but it was supposed to be a necessary part of that system, that the effects found here should be here distributed in just proportion to the whole property and all the debts;

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[1] But see *Fox* v. *Adams*, 5 Greenl. 245; *Lord* v. *Brig Watchman*, 8 Amer. Jurist, 284.

[1] See *Green* v. *Mowry*, 2 Bailey, 163.

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whereas the effect of the principle contended for in this suit, is to break down the attachment law and transfer all the effects to a foreign country, to be there distributed, much to the inconvenience certainly of some if not all the creditors of the bankrupt here.

There being no case in Massachusetts which can sustain the claim of the assignees of the bankrupt, we have examined the reports of adjudicated cases in other States, in order to ascertain what the law is among them; and with the exception of the case of *Holmes* v. *Remsen*, 4 Johns. Ch. R. 460, it may be safely asserted, that not one out of the numerous State courts has adopted the doctrine sought to be maintained in defence of this suit.

In North and South Carolina,[2] in Virginia, and in Pennsylvania [3] and Maryland, it has been expressly decided, that such assignments have no efficacy against attachments made within their several jurisdictions;[4] and if in some of those States these decisions have been founded upon particular legislative enactments, it is very certain, that in regard to Pennsylvania, the opinion of the court was the result of a deliberate and learned discussion of general principles of jurisprudence, as well as a critical examination of most of the important decisions in England upon the subject.

309 In addition to this, there is the strong, unqualified assertion of Chief Justice *Marshall*, speaking for the court, in the case of *Harrison* v. *Sterry*, 5 Cranch, that "foreign bankrupt laws do not operate to transfer the property of bankrupts within the United States." This decision, it is true, has been found fault with as not being accompanied with any reasoning tending to show its correctness. It can hardly be supposed, however, that it slipped inadvertently from a mind so unapt to entertain or promulgate loose opinions, as that of Chief Justice *Marshall*, and that its unsoundness should also have escaped the attention of the other acute members of that court. It ought rather to be supposed, that it was considered a maxim too well sup-

[2] See *M'Neil* v. *Colquhoon*, 2 Hayw. 24; *Robinson* v. *Crowden*, 4 M'Cord 519.

[3] See *Mullikin* v. *Aughinbaugh*, 1 Pennsyl. R. 117.

[4] The same has been decided in New Hampshire; *Saunders* v *Williams* 5 New Hampsh. R. 213.

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ported by authority, and too well known in practice, to require the support of argument. And I am inclined to think, that were it not for the profound and captivating discussion of Chancellor *Kent* in the case of *Holmes* v. *Remsen*, the truth of the maxim as stated by Chief Justice *Marshall* would not have been called in question.

In regard to the last mentioned case, it cannot be considered as settling the law even in New York. The most that can be made of it is, that it gives the opinion of a most accomplished and enlightened jurist in favor of the position, he sitting in chancery, not feeling himself shackled by the technical rules of the common law, and feeling a generous ambition to introduce into the code of the State with which his name is identified, a broad and liberal rule fit for the government of the whole mercantile world, of which no man is better suited than himself to be the legislator. I scruple not to say, that the principles which he advances, and the system which he wished to enforce, ought to belong to the code of nations, and that it would be happy, if, by treaty between this country and the civilized nations of Europe, the principles which received his powerful support should be made to constitute a branch of the *jus gentium*, and that a place for its execution with fairness and reciprocity should be adopted; but until that shall be done, there seem to be insuperable difficulties in the way of a partial adoption of it by one country, or rather by one small section of the country, when the greater part of the rest of the world might repudiate it. I will only refer to the very able argument of a sound common lawyer, Mr. Justice *Platt* of the same State, to show the improbability that the opinion of Chancellor *Kent* will be adopted as the law of the State of New York.

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And we may now conclude, as that eminent man himself has done in his recent work, which does himself so much honor and the public so much good, that the American law is decisively in opposition to the opinion which he maintained in the case of *Holmes* v. *Remsen*. And thus ought this case to be settled, for we cannot receive the law of any foreign country; and however well disposed the English courts may be to adopt a more enlarged and liberal system, and however successfully the recent decisions in that country may have contributed to

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that end, we do not think ourselves at liberty to follow in a train which partakes so much of judicial legislation. Down to the time of our Revolution, we think the adjudications in the courts of law in England would fully justify the position laid down by Chief Justice *Marshall* in the case of *Harrison* v. *Sterry*, *viz.* that foreign bankrupt laws do not operate to pass the property of bankrupts in other countries. It was certainly so in the time of Lord *Mansfield*, and no one will deny him the credit of being willing to liberalize the law in all matters relating to commerce or the intercourse of merchants.

In the case of *Cleve* v. *Mills*, tried before him at the Cockpit, he is stated to have said, that the statutes of bankruptcy do not extend to the colonies or any of the King's dominions out of England, but the assignments under such commissions are considered as voluntary, and as such can take place between the bankrupt and the assignee, but do not affect the rights of any other creditor. 1 Cooke's B. L. 243.

And in the case of *Le Chevalier* v. *Lynch* the whole court of King's Bench affirmed the same doctrine. A creditor of the bankrupt, against whom a commission had issued in England, attached a sum of money in the hands of a debtor of the bankrupt in St. Christopher, an island within the British do
311 minions, and this attachment was held good. Lord *Mansfield* says, if a bankrupt has money due to him out of England, the assignment under the bankrupt laws so far vests the right to the money in the assignees, that the debtor shall be answerable to them. But if, in the mean time, after the bankruptcy and before payment to the assignees, money owing to the bankrupt out of England is attached *bonâ fide* by regular process, according to the law of the place, the assignees in such case cannot recover the debt. Doug. 161. And the same principle is affirmed by the same eminent judge in the case of *Waring* v. *Knight*, 1 Cooke's B. L. 307.

Now this was the law of England down to 1768, and therefore the law of this country. I do not know what can be said in answer, unless it be, that though the laws of the colonies, and of other countries, did not recognise the English statutes of bankruptcy, and therefore the English courts were obliged to give effect to the judgments which took from their operation

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the effects of bankrupts, yet nevertheless this was wrong and that the courts of other countries ought to adopt a more liberal principle. But however satisfied we may be of this admonition, certainly on the question what is the law, it cannot be suffered to have any influence.

The Scotch courts, until a comparatively recent period, understood the law as Lord *Mansfield* did, and uniformly gave preference to their arrestments over the assignments of commissioners under the English Bankrupt laws, as appears by the case of *Thorold* v. *Forest*, 2 Dow, 237, and some other Scotch cases which have been cited. During this time however the law must be considered as quite unsettled in England, or else the courts of common law and chancery proceeded upon very different principles, for in the year 1769 in the case of *Jollet* v. *Deponthieu*, and *Solomons* v. *Ross* in the year 1764, full effect was given in the court of chancery, to a process similar to a commission of bankruptcy in England, by allowing the creditors of the bankrupt's estate to recover a debt from an English subject, although it had been attached after the appointment of curators, by another English subject. This was certainly contrary to Lord *Mansfield's* doctrine, that a commission of bankruptcy does not reach beyond the jurisdiction where it issued. It is probable, however, that it was not of right, but of comity, that this proceeding was had. The neighbourhood of Holland, its intimate connexion with England in commerce, and the actual or expected reciprocity in regard to English commissions of bankruptcy, without doubt influenced the opinion of the chancellor; for if it was considered as the necessary result of legal obligation, how is it to be accounted for, that in 1779, the same high court, held by commission, should have decided that the assignment did not divest the property of the bankrupt, as the debt was due in the plantations, but that it only gave the assignees the right to sue for it; that the creditor in Rhode Island, a British province at the time of the transaction, had also a right to sue, and by his judgment had obtained a priority? The true reason for this contrariety of decision is the one, probably, stated by the Lords Commissioners, *viz.* that in the case of *Solomons* v. *Ross* and *Jollet* v. *Deponthieu*, which were Dutch bankrupt-

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cies, "*there were bankrupt laws in Holland, but none in the plantations.*" Thus intimating, that where there would be reciprocal advantages the proceedings in the foreign commission would by comity be allowed to operate in England.

It would be useless to go over the numerous decisions which have taken place in England since our Revolution, it being very obvious that there has been a gradual extension of the legal effect and operation of commissions, until at last it has got to be the opinion of very eminent judges, as it is that of Chancellor *Kent*, that they are universal in their operation, within the United Kingdom and without, and that all the property of the bankrupt, wherever situated, is transferred by the assignment: and so strong is the opinion in the minds of some eminent judges, that they hardly deem any nation entitled to the appellation of civilized, which does not admit and enforce the same doctrine.

They first began by obliging the English creditor, who had possessed himself of the property of the bankrupt in a foreign
313 country, to refund to the assignees; and this is wholly unobjectionable, for being a subject of the laws, he ought not to be allowed an advantage over creditors of the same country, but should be considered as the agent of the assignees in collecting the effects of the bankrupt.

I believe this is the whole extent of any English adjudications, for all beyond is only the expression of very strong opinions by individual judges. *Sill* v. *Worswick*, 1 H. Bl. 615; *Hunter* v *Potts*, 4 T. R. 182; *Ex parte Frank*, 1 Cooke's B. L. 336, and many other cases. The Scotch courts have followed the English, as was to be expected, considering the almost nominal independence of their judiciary upon that of England. There is no case in which the right of a foreign country to deny this full effect to English commissions has been questioned; so that after all it is a mere question of comity, which will be determined by the courts of every nation according to those circumstances existing there, which ought to affect a question of that kind. It cannot be considered a principle of universal law which every nation is bound to recognise. In Holland and France, where there are bankrupt laws, it is without doubt convenient

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to give effect to the bankrupt laws of England, she reciprocating the indulgence. The daily intercourse between those countries and their proximity, render it quite easy for the creditors of each to prosecute their claims in the tribunals of either: and if there were a bankrupt law in the United States, such is the increased facility of communication with England, that in many cases it would not be very inconvenient for merchants in either country to transmit their claims to the other. But the want of such laws here seems to remove all ground of reciprocity. If the merchant of New York or Boston becomes insolvent, having property or debts in England, the English creditor may avail himself of them without being subject to refund or distribution. But giving force to the English bankrupt laws here would deprive the American creditor of the right of priority secured to him by the laws of his own State or country. And then again, if this is a matter of law, of right and not of comity, it must be exercised towards the most distant as well as towards the nearest nations, towards Russia and the British dominions in India, as well as towards 314
the Island of Great Britain; and great inconveniences cannot but suggest themselves as arising out of this broad and universal system. It may be well at some future time, when there shall be bankrupt laws here, to accept the proffer of Great Britain, France, or Holland, to reciprocate the benefits of such a system, but we are persuaded, if such a change shall take place, it must be under the auspices of the national legislature, or the national courts, or of some treaty with the commercial nations of Europe, and not by the adjudications of a court of one out of the numerous governments which compose the United States.

It is asked, whether we should not give force to the assignment of property here by its owner abroad, when the object is to pay or secure particular creditors to the prejudice of the rest. An affirmative answer to this question does not involve the necessity of giving the like force to assignments under a commission of bankruptcy. The former would be consistent with our laws and our practice; it is merely acknowledging the personal right of the proprietor to dispose of his effects for honest purposes. The latter is yielding to the law of another

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country, which we are not obliged to do, and cannot without establishing a law in Massachusetts which is not recognised anywhere else in America. We do not deny the principles which attach themselves as maxims to personal property, that it has no *situs*, follows the person of the owner, and at his death is to be distributed according to the laws of the domicile of the owner.[1] But the relation of debtor and creditor, and the rights of the latter over the effects of the former, are distinct objects of jurisprudence within the control of the legislative power of the country where the property is. This power is absolute and uncontrollable; it may be unreasonably exercised, but still it is legal, if so willed by a sovereign independent power, for the dominion is here. Such was the law of England; before, upon principles of comity only, the code was accommodated to the mercantile situation of that country, and even now doubts occasionally spring up in the minds of great judges whether the new system rests upon a solid basis;

315 for as late as the year 1817, we find that great jurist, Sir *William Grant*, hesitating between the old and the new principle, and manifesting a strong inclination toward the opinion of Lord Chief Justice *Eyre*, who dissented from the other judges in the case of *Phillips* v. *Hunter*. *Birchwood* v. *Miller*, 3 Meriv. 279.

In this state of things, the principle having been applied in England as yet only to cases arising in countries where bankrupt laws or something equivalent exist, it having been nowhere adopted in America except in the solitary instance of the chancery decision in New York, and having been expressly rejected by one tribunal of paramount authority, and another of the highest respectability; we think it would be presumptuous in this Court to open the acknowledged code to the reception of a rule, which, however reasonable and beneficial if universally admitted, would be likely to produce embarrassment and inconvenience if so partially introduced.

With respect to the other ground upon which it is suggested that the trustee ought to be discharged, *viz.* that the

[1] See *Dawes* v. *Head*, 3 Pick. (2nd ed.) 144, note 1; Story's Confl. of Laws 312, 313.

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debt he owes to Williams was contracted in England and is payable there only, so that he could not and therefore the present plaintiff cannot make it payable here, we do not perceive any legal principle upon which the objection rests. It is a common mercantile debt, arising from acceptances and advances for which no funds were provided, or if provided, were not realized. This was a debt from Marshall every where, in whatever country his person or property might be found. A suit might have been maintained by Williams here, and therefore the debt may be attached here. The cases cited in support of this objection do not apply. That of *Maine F. & M. Ins. Co.* v. *Weeks*, 7 Mass. R. 438, only decides that there must be a right of action in the principal against the trustee, to sustain the process, and we think there clearly was in this case; and that of *Clark* v. *Moody*, 17 Mass. R. 145, regards only the liability of a factor to an action, where goods are received by him on consignment.

We see no reason therefore why the trustee in this case should not be charged. [1]

[1] See Story's Confl. Laws, § 403 to § 422, *p.* 336 to 355; 2 Kent's Comm. (3d ed.) 404 to 407; *Saunders* v. *Williams*, 5 N. Hamp. R. 213; *Plestoro* v. *Abraham*, 1 Paige, 236; *Abraham* v. *Plestoro*, 3 Wendell, 538; *Olivier* v. *Townes*, 14 Martin's (Louis.) R. 93; *Fox* v. *Adams*, 5 Greenl. 245; *Lord* v. *Brig Watchman*, 8 Amer. Jurist. 284; Angell on Assignments, 57 to 65; *Adams* v. *Cordis*, 8 Pick. 200.

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ZEBINA EASTMAN *et al. versus* WINSLOW WRIGHT *et al.*

An agreement reciting that E and others, whose names are subjoined, purchasers of pews, &c. claim of W and others, whose names are subjoined, original subscribers to build the meetinghouse, &c. and referring the claim to arbitration, was signed by about fifty persons, and the arbitrator made an award. In an action on the agreement brought by some of the signers as purchasers of pews, against the others as original subscribers, it appeared on the general issue, that the defendants also were purchasers of pews, and it was *held* that the action could not be sustained for want of proper parties.

The Court will not upon motion set aside a plea of a release of the action by a co-plaintiff, on the ground that it was collusively obtained, for the question of collusion must be tried by the jury.

THIS was an action of debt upon the following articles of agreement, dated September 8, 1824, *viz.* "Whereas Zebina Eastman and others, whose names are hereunto subjoined, *purchasers of pews* in the meetinghouse of the Second Society of Universalists in Boston, claim of Winslow Wright and others, whose names are hereunto subjoined, *original subscribers for building* said meetinghouse, the sum of 3326 dollars and 41 cents, to be paid into the treasury of said society, or to admit said purchasers of pews to be owners in common with the original subscribers, in all the unsold pews in said meetinghouse; and that the committee or trustees who received the deed of the land for the said Second Society of Universalists, forthwith execute and deliver to said society a good and sufficient deed of the same; and that the original subscribers retrace their act of May 25, 1821, in lowering the taxes on twelve of their pews in said meetinghouse; — it is agreed to refer the abovementioned claim to the arbitration of the Hon. Charles Jackson, &c. together with all other demands relating to said society, subsisting between the said parties, from the date of their act of incorporation to the present time. It is understood and agreed, that the said referee is to exercise all the power and authority given to a court of equity by the laws of this Commonwealth; and no counsel is to be
317 employed by either party, &c. And the said parties mutually agree to forfeit and pay the sum of 5000 dollars if they do not abide the judgment of said referee."

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This agreement was signed and sealed by Eastman, Wright, and about fifty other persons, no one specifying whether he executed it as a purchaser of a pew, or as an original subscriber to build the meetinghouse. The arbitrator made an award which the plaintiffs alleged had not been complied with by the defendants. The breaches assigned were, that the defendants had not paid certain taxes to the society, and had not paid to five of the plaintiffs certain sums awarded to them respectively. The action was brought in the names of about thirty-five, as purchasers of pews, against fifteen, as original subscribers to build the meetinghouse.

Among other pleas, the defendants pleaded *non est factum*, upon which issue was joined; — and a release by ten of the plaintiffs. A replication that the release was obtained by fraud and collusion, was filed *de bene esse*, and a motion was made to the Court to strike out the plea on the ground that the release was so obtained.

Under the general issue the agreement was produced, and the plaintiffs being admitted to be purchasers of pews and the defendants to be original subscribers to build the meetinghouse, as set forth in the declaration, the defendants' counsel contended that the agreement did not support the declaration, there being, as they alleged, no contract therein stated between different parties, some of the original subscribers, defendants, being also purchasers of pews; although none of the plaintiffs were original subscribers; so that the action, if maintainable, should be brought by the several persons respectively interested in the award; and that the defendants could take advantage of this difficulty, under the general issue. The jury were instructed to find this issue for the plaintiffs.

Under the other issue the defendants produced the release signed by ten of the plaintiffs. The other side produced an affidavit of several of the plaintiffs, stating that the release was executed without their knowledge, and as they believed, was 318
obtained by collusion. The defendants objected to this affidavit. The judge refused to strike out the plea, reserving the question for the whole Court, and instructed the jury to find the issue for the defendants.

Rand, for the plaintiffs, insisted that there were two parties *March 14th 1827.*

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to the agreement, namely, the purchasers of pews, and the original subscribers for building the meetinghouse.

As to the release, he said it was executed only by persons who had comparatively but a trifling interest in the suit; that by signing the articles of agreement, they in fact covenanted, that when it should be necessary for the separate rights of one to bring an action in the names of all the plaintiffs, they would suffer the action to be prosecuted, and the release was in fraud of their own agreement; and that where equity requires it, the Court will set aside a plea of release. *Payne* v. *Rogers*, 1 Doug. 407; *Legh* v. *Legh*, 1 Bos. & Pul. 447; *Jones et al.* v. *Herbert*, 7 Taunt. 421.

Shaw and *C. G. Loring*, *contrà*, denied that there was any thing fraudulent or inequitable on the part of the releasors, and contended that the action could not proceed. *Wilson* v. *Mower*, 5 Mass. R. 407. They insisted, that if all the signers of the agreement who were purchasers of pews, had been joined as plaintiffs, the action could not be sustained, some of them being defendants; *Mainwaring* v *Newman*, 2 Bos. & Pul. 120; and if they were not joined, it could not be sustained on account of the non-joinder. 1 Saund. 154, note, and 191*f*, note. And they suggested that each individual who was aggrieved, might bring his separate action upon the award, though not upon the agreement. *Winter* v. *White*, 1 Brod. & Bing. 350.

June 26th, 1828.

MORTON J. delivered the opinion of the Court. This is an action of debt brought on articles of agreement alleged to have been entered into by the plaintiffs on one part and the defendants on the other. The plaintiffs aver, that by this agreement, they, as purchasers of pews in a certain meetinghouse, on the one part, having certain claims and demands in relation to such house against the defendants, as original proprietors of the house, on the other, mutually agreed to submit them to arbitration, and that the arbitrator, having accepted the trust, made an award, but that the defendants did not abide by it, but in several particulars violated it.

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There are several pleas which it will not be necessary particularly to notice, as the examination of the two principal questions discussed at the bar will be decisive of the case

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It is necessary to the validity of every contract, that there should be proper parties, competent to contract with each other. Our attention therefore ought first to be directed to the inquiry, who are the parties to this agreement, and whether the parties to the agreement and the parties to the action are th same.

It is contended on the part of the defendants, that the language of the instrument is so vague, that no definite meaning can be deduced from it, and therefore that it is void for uncertainty. It obviously is not drawn with technical accuracy, nor is it free from ambiguity. And this difficulty meets us in our first inquiry. It is not easy to determine from the instrument itself, who are the parties to it; nor whether it is, as the plaintiffs contend, a contract between a number of individuals having a joint interest, asserting a claim on one side, against another association of individuals also having a joint interest in resisting it on the other, or a several contract between each of the signers and each or all of the other signers. And no solution of this question can be drawn from any thing contained in the instrument itself. It purports to be an agreement between the builders of the house and the purchasers of pews in it; but who among the subscribers belong to the one class and who to the other, cannot be inferred from any thing appearing in the writing itself.

In looking into the report of the case, we learn that the defendants were the builders of the house, and the plaintiffs were purchasers of pews. The controversy was between these two classes of persons, and the award was intended to be a determination of this controversy. Did the facts stop here, we should have no difficulty upon this part of the case. But it further appears, that not only the plaintiffs, but many of the 320
defendants, were purchasers of pews. If the purchasers of pews were the claimants in the arbitration, they are jointly entitled to the fruits of the award, and will be jointly interested in the present judgment, and therefore must necessarily have been joined in the action. In the agreement declared on, the claim is made by "Eastman and others whose names are subjoined, purchasers of pews," against "Wright and others whose names are subjoined, original subscribers for building said

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meetinghouse." It cannot therefore be said, that this demand was made by the purchasers of pews upon those only of the original subscribers who were not purchasers. The facts of the case will not admit of this construction, for Wright must necessarily be one of the parties contracting with the purchasers of pews, and yet Wright himself was one of the purchasers. Nor will the language of the instrument, or the justice of the case, permit us to adopt the opposite construction, that the demand was made by those of the purchasers of pews who were not original proprietors, upon all the original proprietors. Many of the original proprietors were purchasers, and if the purchasers have suffered by the acts of the proprietors, it would be very unjust that those purchasers who were not proprietors should be indemnified, while no remedy was provided for those who were proprietors, but their loss increased by the indemnity which they were held to aid in giving to those who were purchasers with themselves. This construction would be equally inconsistent with the language of the instrument and the justice of the case, and cannot be supposed to have been the intention of the contracting parties.

We think it therefore very clear, that if the subscribers to this instrument contemplated a contract between two parties, they intended that those parties should be the purchasers of pews on one side and the proprietors of the house on the other. We have already seen that several of the defendants were both purchasers and proprietors. If this be the true construction of this contract, is it valid? Can it be enforced?

321 If the plaintiffs could recover, in what manner would they distribute the amount of the judgment recovered? In what proportion would each one claim? If the defendants were held to pay damages for a violation of this agreement, in one character, some of them might recover back a portion of it in another. But it is a first principle, that in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself.[1] He can in no form be both obligor and obligee.

[1] See *Moffat* v. *Van Mullingen*, 2 Chitty's R. 539; *Bosanquet* v. *Wray*, 6 Taunt. 597; *S. C.* 2 Marshall, 319; *Harvey* v. *Kay*, 9 Barn. & Cr. 356.

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The defendants' counsel suggested a different construction of the instrument, which may be adopted without doing violence to the language, on which it may be supported and enforced consistently with the principles of the law. It is, that although it is probable that the signers of the instrument, if they had any clear idea of the difficulty which they wished to have adjusted, viewed it as a controversy between the two classes of persons before described; yet having reference to these differences, they well might all join in one submission of their several claims, growing out of one general transaction. Whether this instrument will admit of this construction and may be considered the several obligation of each signer, it is not necessary nor proper for us now to determine. The case of *Winter* v. *White*, 1 Brod. & Bing. 350, cited by the defendants' counsel, is an authority strongly tending to support this view of the case. And although the learned arbitrator, in some parts of his award, seemed to view the controversy as one between the purchasers of pews and the builders of the house, yet in others he recognised the claims of individuals, and awarded severally for and against persons of the one class and the other.

Upon the whole, we are satisfied that the construction of this agreement contended for by the plaintiffs' counsel is not a sound one; that if it be viewed as a contract between the purchasers of pews and the builders of the house, it cannot be enforced; and that the plaintiffs are not entitled to recover in this action.

But if the agreement were a valid one and such as would support this action, yet the release relied upon by the defendants would bar it. This release, signed by ten of the plaintiffs, recites that the action was commenced and carried on in their names without their consent; that they disavow it, and authorize an agent to discontinue it, or cause their names to be stricken from the writ; and contains a full release and discharge of the action and the cause of action. 321

Holmes v. *Higgins*, 1 Barn. & Cresw. 74; *S. C.* 2 Dowl. & Ryl. 196; *Teague* v. *Hubbard*, 8 Barn. & Cresw. 345; *Milburn* v. *Codd*, 7 Barn. & Cresw 419; Collyer on Partn. 383.

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The plaintiffs' counsel contends that this release was a fraud upon the other plaintiffs and ought to be set aside.

Courts of law recognise assignments of choses in action, and protect the equitable rights of the assignees. An action may be maintained in the name of the assignor for the benefit of the assignee.

The assignor, by the assignment, gives authority to the assignee to use his name in any legal proceedings which may become necessary to give full effect to the assignment. The assignor becomes the trustee of the assignee, and a release made by him after notice of the assignment would be a fraud upon the assignee, and would not defeat an action brought for the benefit of the latter in the name of the former.[1] These well settled principles are recognised and commented upon in many of the cases cited by the plaintiffs' counsel.

In cases of trust the *cestui que trust* may have an action in the name of the trustee, who cannot without a breach of trust release it. This principle applies to cases where one person, to enforce his equitable rights, is obliged to sue in the name of another, who has no interest in the suit. Of this description are the cases of *Payne* v. *Rogers*, 1 Doug. 407, and *Doe on demise of Locke* v. *Franklin*, 7 Taunt. 9.

If one of several partners, or other joint owners of a chose in action, assign his interest in it to the other partners or owners, the assignment will be recognised in law, and after notice of it the debtors cannot rightfully pay the assignor, nor can he give a valid discharge of the debt. The cases of *Mountstephen* v. *Brooke*, 1 Chitty's R. 390, and *Arton et al.* v. *Booth*, 4 Moore, 192, were decided upon this principle.

The cases cited in the argument, upon this point, clearly establish the doctrine, that when the plaintiffs are mere trustees, they cannot discharge the actions to the injury of
323 *cestui que trusts.* But none of them extend to cases where the plaintiff maintains the action in his own right and has a direct interest in the judgment. Of this latter description is the case at bar. The plaintiffs sue in their own right. They

[1] See *Hackett* v. *Martin*, 8 Greenl. 77; *Matthews* v. *Houghton*, 1 Fairfield 420; *Welch* v. *Mandeville*, 1 Wheaton, 233; *S. C.* 5 Wheaton, 277.

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are all equally liable for costs; and each of them is directly interested in the judgment.

It cannot be inferred from the written agreement, that it was a part of the contract that one portion of the parties to it should have authority to use the names of the others without their consent. We can see nothing to distinguish this from an ordinary joint contract in which one of several may receive satisfaction for the whole and give a valid discharge of the obligation. [1]

If one partner or joint contractor unjustly refuses to suffer his name to be used in a joint action, or receives satisfaction, or releases the action to the injury of the others, they may have a remedy against him by a special action on the case. *Wilson* v. *Mower*, 5 Mass. R. 411

In England, when a nominal plaintiff, or one of several plaintiffs, releases an action in fraud of the party in interest, the court directly interfere and set aside the release. [2] But in this State the courts never have exercised this power. The release may be avoided if fraudulent, but the question of fraud can only be tried by jury.* In the case at bar, the question was properly submitted to the jury, and we think there is no reason to complain of their verdict.

Judgment for the defendants.

[1] See Collyer on Partn. 258, 259, 379, 380; *Smith* v. *Stone*, 4 Gill & Johns. 310; *Bruen* v. *Marquand*, 17 Johns. R. 58; *Napier* v. *M'Leod*, 9 Wendell, 120; *Everenghim* v. *Ensworth*, 7 Wendell, 326; *Halls* v. *Coe*, 4 M'Cord, 136, *Barker* v. *Richardson*, 1 Younge & Jerv. 365, 366; 3 Kent's Comm. (3d ed.) 48, 49.

[2] See *Barker* v. *Richardson*, 1 Younge & Jerv. 365; Collyer on Partn. 380.

* See *Loring et al.* v. *Brackett*, 3 Pick. 403.

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JAMES NESMITH *et al. versus* WASHINGTON BANK

The charter of a bank provided that the capital stock should not be sold or transferred, but should be held by the original subscriber during one year from the date of the charter; and a by-law declared the stock of each stockholder to be pledged for any sum which he should owe to the bank. Within the year a subscriber assigned his shares, and the assignee gave notice thereof to the bank and paid the last instalment due on these shares. Afterwards, and within the year, the bank lent money to such subscriber. It was *held*, that although the assignee was not entitled to a certificate of stock in his own name, yet that the assignment was valid in equity, and that, as the money was lent after notice of the assignment, the shares were not pledged for its repayment.

But whether the by-law could under any circumstances create a lien on the shares as against the creditors of the stockholder, *quære*.

THIS was an action of assumpsit instituted in the name of the plaintiffs for the benefit of the Provident Institution for Savings, to recover the amount of the dividend declared by the Washington Bank, on the 5th of April, 1826, on two shares of the stock of the same bank standing in the names of the plaintiffs. The defendants pleaded the general issue.

On the trial before *Ward* C. J. of the Court of Common Pleas, the following facts appeared in evidence.

The act incorporating the Washington Bank was passed on the 26th of February, 1825, containing these provisions, *viz.* "The capital stock of said bank shall not be sold or transferred, but shall be holden by the original subscribers thereto, for and during the period of one year from the time of passing this act;"—and "no stockholder shall be allowed to borrow any money until he shall have paid in his full proportion of the whole of said capital stock."

On the 23d of March, 1825, the bank made a by-law, as follows:—"The stock of every member of said corporation shall be considered and is hereby declared to be pledged to the corporation for any and all sums of money which said member may at any time owe said bank; and the board of directors may, if they see cause, refuse to make any transfer or pay any dividend upon the stock of any member who may be so indebted, until said debt be fully discharged."

325 The plaintiffs were original subscribers for two shares in

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the bank, of 100 dollars each, and after paying the several assessments which had been made, amounting in the whole to seventy-five per cent, they on the 1st of September, 1825, transferred their right to these shares to Ball & Davis, and before the 28th of the same month, Ball & Davis transferred their right to the Provident Institution as collateral security for a loan. The treasurer of this institution, on the same 28th of September, the day on which the last instalment of the capital stock of the Washington Bank was payable, paid into the bank the instalment due on the two shares, and gave notice to the president and cashier that these shares were transferred, as above mentioned, to the Provident Institution, and that he made the payment on account of that institution; upon which the president remarked, that the shares could not be transferred for some months then to come.

On the 25th of April, 1826, a dividend of eight dollars was declared upon the two shares, and on the same day the treasurer of the Provident Institution demanded the dividend and a transfer of the shares, and offered to surrender the receipts of the bank for the several instalments which had been paid; but the president and cashier refused to pay him the dividend or transfer the shares.

On the 28th of December, 1825, the bank discounted a note made by the plaintiffs and indorsed by one Baker, for 320 dollars and 50 cents, payable in six months, which was still unpaid.

Upon this evidence the judge instructed the jury, that the legislature, when they granted a charter to a number of citizens to facilitate their operations in any branch of business, had the power and the right to couple with the grant any limitations and restrictions which they might consider the public interest and convenience and sound policy required; that the act incorporating the bank, having expressly provided that stockholders should not sell or transfer their stock, but that the shares should be held by the original subscribers for one year from the time of passing the act, the transfer from the plaintiffs to Ball & Davis was void, and the Provident Institution could derive no title through them to the two shares or the dividend declared upon them; that it was true, there was

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no equity in the bank's retaining the shares to cover a loan made to the plaintiffs after notice that the Provident Institution claimed the shares under an assignment and had paid one instalment of the capital stock, yet the provision in the statute was peremptory, and an assignment, which in equity would otherwise have been good and the interest under it have been protected by the court, must bend to the positive provisions of the statute; that the evil resulting from bank charters being obtained merely for the purposes of speculation, when there was no intention on the part of the applicants to fill up their shares and pursue the business of a bank upon regular principles, was a great one, and in order to suppress it the legislature had found it necessary to prohibit the sale and transfer of shares until the whole capital stock was paid in, and to prohibit a loan to any stockholder upon the credit of instalments which had been paid in, to enable him to pay subsequent instalments.

Under the above instructions the jury returned a verdict for the defendants; whereupon the plaintiffs filed exceptions.

April 9th, 1827.

Savage and *Merrill* supported the exceptions and cited *Quiner* v *Marblehead Soc. Ins. Co.*, 10 Mass. R. 476.

Cooke, for the defendants. The by-law in question permits the defendants to refuse their assent to a transfer of shares, so long as any debt remains due from the stockholder; and in this there is nothing illegal or inequitable. A mortgage for security against future liabilities has been upheld by this Court.

The loan was made in reference to the by-laws, and the instrument of assignment to the Provident Institution recites that the shares are to be subject to the by-laws. *Taylor* v. *Bates*, 5 Cowen, 376. The defendants did not assent to the assignment, but on the contrary they gave notice that the shares could not legally be transferred for some months. But the act of incorporation is conclusive; according to which a transfer cannot be made within the year. The plaintiffs assign
327 to a third person in order to procure a loan to pay their instalments; this the legislature intended to prevent, and the assignment is therefore entirely void. *Mackie* v. *Cairns*, 5 Cowen. 547.

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The opinion of the Court was drawn up by

PARKER C. J. The present plaintiffs are the legal owners of the two shares on which the dividend is claimed. They were original subscribers and have a right to the dividend, unless the bank can show a right to retain it and appropriate it to their own use. They set up such a right under the statute incorporating the bank, and under a by-law made by the corporation. The general objection under the statute is grounded on the provision contained in it, "that the capital stock of said bank shall not be sold or transferred, but shall be holden by the original subscribers thereto, for and during the period of one year from the time of passing this act." It appearing in the case that the plaintiffs had made a transfer of their two shares to Ball & Davis before the expiration of the year, and that Ball & Davis had assigned the same to the Provident Institution for Savings also within the year, for whose benefit this action is brought, it was considered by the Court of Common Pleas that both these transfers are void, and so that the action could not be maintained, notwithstanding the defendants had so far admitted the assignment to the Provident Institution as to receive of their agent the last instalment of 25 dollars on each share; intimating to them only, that the transfer would not be valid for two or three months to come from the time this instalment was paid in; which was on the 28th of September, 1825, the year not expiring until the 26th of February, 1826.

Certainly the transfers were not valid in law when they were made, and the bank could not legally then have issued certificates to the assignees, or have admitted them to be the owners on the books; but we cannot discern why the assignment did not equitably pass the property, as well as the indorsement of any paper not negotiable by law, the object of the legislature being to prevent a change of responsibility to the bank or the public, and to prevent speculation in the stock for a limited period; not to lock up this property against the 329
creditors of stockholders, or to deprive them of the power of voluntarily paying their debts with it. The transfer, as we understand the statute, is not made null and void; it is merely inoperative during the prohibited period; so that the original

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subscribers are to stand as owners in regard to the bank, and in regard to such creditors as may have occasion to attach the property as theirs, they not knowing of any equitable lien upon it in favor of any other person. "The stock shall not be sold or transferred, but shall be holden by the original subscribers thereto for and during the period of one year." Can it be supposed that the legislature intended it should be holden free from their creditors for that period? If so, they would have provided a safe retreat for debtors for any sum which they may have subscribed to the bank. No, the sole object was to cure a supposed evil, that of subscribing to bank stock without intention to become stockholders, but for the purpose only of speculating upon the rise of shares; and this was done to a considerable degree by an interdict upon their transfer for a year. If more was intended, all such transfers would have been declared void to all intents and purposes, and then the singular phenomenon would have existed, of a legal disability in the debtor to appropriate his money to the payment of his debts. It cannot be disputed that the plaintiffs' right to these shares might have been attached and sold under the statute which authorizes such a disposition of such property, nor can it be doubted that if the plaintiffs had made a direct assignment to the Provident Institution as collateral security for money borrowed to pay the last instalment, the equitable interest would have passed.[1] Shall the intermediate sale to Ball & Davis make a difference? We think not; for the assignment to them, though it gave them no right to demand certificates or in other respects to be considered owners during the year, yet we think passed the equitable interest, which after the year might be converted into legal property. In the case of *Quiner* v. *Marblehead Soc. Ins. Co.* 10 Mass. R. 476, principles analogous to those which present themselves in this action were discussed and decided. The statute incorporating
329 that company provided, that no transfer should be permitted or be valid until the whole stock was paid in. A transfer was made to Isaac Story before the whole stock was paid in, to satisfy a debt which two of the original subscribers owed to

[1] See *Sargent* v. *Essex Marine Railway Corp.* 9 Pick. 204

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him. This was held to be an assignment in equity, which entitled Story to the certificates after he should have paid what remained due on the stock. The difference between the two cases is, that Isaac Story was an antecedent creditor of Bradstreet & Story, the assignors, but here it does not appear that Ball & Davis were any thing but purchasers; but we think the only effect of this circumstance is, that Ball & Davis, and those claiming under them, could not become owners for the year, during which time the shares remained to all legal purposes the plaintiffs' property, liable for their debts to creditors without notice. The *St.* 1804, *c.* 83, which provides for the attachment of shares and interests in incorporated companies, would, we think, authorize the attachment of shares not filled up, for it speaks of the amount of interest as distinct from the shares which any debtor may have in the company stock.

What fair or legal objection then can be made to the plaintiffs' recovery of the dividends upon their shares, to the use of those to whom they have been equitably transferred? There is no objection to the capacity of the plaintiffs, for they are the legal owners of the shares. Have the bank any lien or equitable interest to set up in defence? They do in truth claim to hold these shares and the product of them, on account of a loan made to the plaintiffs of a sum beyond the value of the shares, by virtue of a by-law which subjects to a lien the stock of all members who shall owe any thing to the bank. We need not, in order to decide this case, go into the consideration of the validity of this by-law against any creditors of a stockholder, though it may be worth inquiry by the corporation, whether such a by-law can be of any avail except between them and the debtor.[1] We suspect it is a first attempt, by a general declaration of this kind, to give themselves a preference over other creditors, without taking the usual means of pledge or transfer of the particular stock they intend to hold.

But admitting the by-law to be operative under common circumstances, we think it ought not to avail in the present instance. The loan was made after notice by the Provident Institution of their claim to the shares, and after the defend- 330

[1] See *Plymouth Bank* v. *Bank of Norfolk*, 10 Pick. 454.

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ants had received from that company the instalment due on the shares. They surely could not, under such circumstances, have lent the money on the faith of these shares. They took the usual security, notes with indorsers. They cannot resort to their by-law to strengthen their security, and on this ground certainly have no equitable claim.

For the foregoing reasons we are all clear that the verdict must be set aside, and a new trial granted at the bar of this court.

MARY JOHNSON *versus* NATHANIEL F. AMES.

Where a claim filed by the plaintiff before commissioners of insolvency upon the estate of an intestate, was rejected because he was a dormant partner of the intestate, and so liable to the other creditors, but he did not thereupon give notice, within twenty days, of his intention to prosecute an action at common law, and it afterwards appeared that the assets were more than sufficient to pay the other creditors, it was *held* that he could not maintain an action of assumpsit against the administrator for the general balance due to him.

But *it seems* that he would have a remedy by a bill in equity.

Whether the commissioners might not have received the claim and reported the special circumstances of it, so that it might be allowed or not, as the situation of the estate would justify, *quære.*

Whether a dormant partner is entitled, upon the death of the active one, to take possession of the partnership effects and settle the partnership concerns, *quære.*

ASSUMPSIT. The fourth count alleges that Seth Johnson, the plaintiff's testator, and Ezra Hyde, the defendant's intestate, on the 21st of October, 1809, entered into an agreement as copartners, by which it was agreed that Johnson should advance to Hyde, 5000 dollars, to be used in trade, that such trade should be carried on for their joint benefit in the name of Hyde alone, and that Johnson should receive from Hyde, in addition to the sum advanced by him, one half of the profits of
331 the trade; that Johnson did advance to Hyde 5000 dollars according to the agreement, and thereby became the dormant partner of Hyde; that Hyde engaged in trade and continued in it fourteen years, and made great gains, amounting to 10,000 dollars; that on the 1st of January, 1823, the partnership was dissolved by mutual consent, and by virtue of the agreement Hyde became liable to pay to Johnson, after payment of al

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debts and obligations incurred in the trade, the sum of 5000 dollars, as well as his proportion of the gains; that in the course of the trade Hyde contracted large debts, and which remained unpaid at the time of his death; that a commission of insolvency was issued on his estate; that many creditors to whom Hyde became indebted, in the prosecution of the trade, to the amount of 60,000 dollars, proved their debts; that Johnson submitted his claim to the commissioners for allowance, and that its allowance was objected to by the other creditors, on the ground that the debts proved by them became due from Hyde during the course of the trade and whilst Johnson was a dormant partner, and that he ought not to have his claim allowed or returned by the commissioners, or to claim any of the assets of the estate of Hyde, until their debts were fully paid, — whereupon for these reasons the commissioners rejected the claim of Johnson, — of all which the defendant had notice; that on the return of the commission to the judge of probate, Johnson gave notice to the defendant, that after he should have collected assets sufficient to pay the other debts due from Hyde, if any further sum should come to his hands, he (Johnson) should hold the defendant liable to account with and pay to him his proportion of the capital stock and profits, or such part thereof as the assets so received should enable the defendant to pay; that the defendant, on the day of the purchase of the writ, after collecting assets enough to pay all the debts due to other creditors as above mentioned, had received the further sum of 5000 dollars; whereupon he became liable, and in consideration thereof &c. promised, &c.

The plea to the foregoing count, protesting that the claim of Johnson was not rejected for the reasons above assigned, simply sets forth the commission of insolvency, the presentment and rejection of the claim of Johnson, the adjudication of the judge of probate that the estate was insolvent, and an order to pay all the creditors, who had made out their claims, in proportion, and that Johnson did not within twenty days give notice at the probate office of his intention to have his claim settled at the common law. 332

To this plea there was a general demurrer.

Shaw and *Morse*, in support of the demurrer. The ques- *March 6th*

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tions are, whether the plaintiff has any remedy for the amount due to the testator, and if so, whether it is by an action at common law. Johnson was a partner as well in regard to Hyde as to third persons, but being a dormant partner, and moreover, the partnership having been dissolved before Hyde's death, he had no right to take any specific property into his possession as surviving partner; he had only a personal claim against Hyde's estate. We are aware that a party is not at liberty to omit filing his claim before the commissioners and then to bring his action; but that principle applies only to cases where the debt is of such a nature as to be capable of being filed and allowed. This claim could not be, for the liability of the administrator was contingent, depending on the assets being sufficient to pay all the partnership debts in full. It could not arise until after the commission should be closed. Hyde may be considered as not strictly a debtor, but as a trustee for Johnson to pay to him such share as should be due after all the debts of the firm were paid and a surplus found, and a bill in equity would lie under a recent statute, if there were no remedy at law. *Ferry* v. *Henry*, 4 Pick. 75. But if the court can administer the same justice at law as upon a bill in equity, they will do it. Here the partnership accounts have been settled, and in this action, which is for money had and received, the same facts can be presented to the court as upon a bill in equity, and the same justice may be done *Fanning* v. *Chadwick*, 3 Pick. 420.

Aylwin and *Mason*, *contrà*, said that in regard to the present claim, Johnson must be considered either as surviving
333 partner, in which case he should have taken possession of the partnership property; or as an independent creditor, and then he should have filed his claim before the commissioners, and if it was rejected, should have given notice, within twenty days, of his intention to prosecute a suit at common law. *Wilby* v *Phinney*, 15 Mass. R. 122; *Paine* v. *Nichols*, ibid. 264; *Boardman* v. *Smith*, 4 Pick. 212. Contingent claims are provided for in *St.* 1821, *c.* 72.

June 26th. PARKER C. J. delivered the opinion of the Court. The question is, whether the plea of insolvency, appointment of commissioners, presentation of the plaintiff's claim, its rejec

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tion, and the allegation that no notice was given at the probate office of an intention to prosecute a suit at law, is a sufficient answer to the plaintiff's demand, as set out in the fourth count in his writ.

This plea is a sufficient answer to the declaration, unless special circumstances stated in it take it out of the general principles as settled in the case of *Paine, Judge*, v. *Nichols*, 15 Mass. R. 264.

By the express words of the statute, all suits are prohibited after the estate shall have been represented insolvent, unless prosecuted in the form therein provided. *St.* 1784, *c.* 2. It does not seem to be in the power of any creditor to an insolvent estate, by averment of special circumstances attending his claim, to avoid the effect of this direct provision of the statute; the intention of the legislature being, that all claims, of whatsoever character, should undergo an examination by the commissioners, and should be paid by a *pro rati* distribution founded on the commissioners' report. And it matters not whether the estate be eventually insolvent or not, as was decided in the case before cited, provided it is represented insolvent and the judge thereupon awards a commission. [1]

If the creditor is dissatisfied with the doings of the commissioners in regard to his claim, he may prosecute it at law, but only on the terms and conditions provided in the statute, for otherwise he will disturb the whole course of proceedings under the commission.

And it is immaterial what are the reasons for which his claim was rejected; for being rejected, he must give notice of his intention to sue, within the time prescribed, in order 334
that proceedings on the report of the commissioners may be stayed until the result of his suit shall be known, and if he recovers, the amount of his judgment is to be inserted in the report, on which the judge will order distribution.

Nor does the allegation that the defendant has recovered assets beyond what is required for the payment of debts, give a right of action, for the estate having been acted upon as

[1] See *Todd* v. *Darling* 2 Fairfield, 39.

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insolvent, the course of the common law is stopped in regard to claims against the estate. This very point was decided in the case before referred to.[1]

Whether the commissioners might not have received the plaintiff's claim and reported the special circumstances of it, so that it might be allowed or not as the situation of the estate would justify, may be matter of doubt, but it is clear, we think, that no action lies against the administrator.

The proper course would seem to have been, for Johnson to have taken possession of the partnership effects, paid off the partnership debts, and then claimed any balance due him against the estate of Hyde; but of this there might be a question, as it not certain that a mere dormant partner would have this right. If it be true, as alleged, that there is a surplus in the hands of the administrator after paying the debts of Hyde, the plaintiff has an equitable claim to so much of it as will satisfy the just demands of her testator, but there is an insuperable difficulty in maintaining a suit at law for it, for the reasons given.

We do not see why a remedy cannot be had on a bill in equity, under the statute providing that process for and against partners and their representatives.[2] There seems to have been no remedy at law, the demand being of a nature not to be allowed by the commissioners, and if there had been a suit under the statute, probably it might have been successfully defended on the ground that the partnership concerns were not adjusted. This however is a suggestion for the consideration of counsel, without intending to be bound by it.

Plea in bar to the fourth count adjudged good.

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[1] It is now provided by the Revised Statutes, that no action shall be brought against an executor or administrator after the estate is represented insolvent, unless &c., or unless the assets should prove more than sufficient to pay all the debts allowed by the commissioners. *c.* 68, § 19. See also §§ 21, 22, 23, 24.

[2] See Revised Stat. *c.* 81, § 8.

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PLINY CUTLER *et al. versus* PETER WINSOR.

A ship-master having agreed to take the defendant's schooner for the purpose of getting employ in the freighting business, engaged to victual and man her, and pay half of all port charges, pilotage, &c. and the defendant engaged to pay the other half, together with eight dollars per month for one man's wages, and to put the schooner in sufficient order for the business; and all money so stocked in the schooner, whether for freight or passage or whatever, was to be equally divided between the master and the defendant, each party accounting for the above. *Held* that the master was owner *pro hac vice*; that the contract did not make him and the defendant partners: and that the defendant was not answerable to a shipper of goods which had not been delivered according to the bill of lading.

Where a vessel is chartered without any limitation of time, it is an indefeasible hiring for every voyage which she shall have undertaken before notice from the owner of his intention to put an end to the contract.

ASSUMPSIT against the defendant as owner of the schooner Alexander, for certain goods laden on board of her by the plaintiffs at Boston, to be carried to Alexandria, she being then commanded by Jesse Snow.

The defence rested upon the ground, that Snow was charterer of the vessel, and so constructive owner *pro hac vice*, when the goods were shipped; and to maintain it, the defendant produced the deposition of Snow, originally taken on behalf of the plaintiffs, and to which was annexed the written agreement made between Snow and the defendant concerning the use of the vessel.

The material part of this agreement is as follows: — "The said Capt. Snow having agreed to take the said schooner Alexander for the purpose of getting employ in the freighting business, doth by these presents promise and oblige himself to victual and man the said schooner, and pay one half of all port charges and pilotage, &c. And I the said Winsor do promise, on my part, to put said schooner in sufficient order for such business, with sails, rigging and tackling, likewise to pay one half of the port charges, pilotage, &c. together with eight dollars per month for one man's wages; and it is understood that all money or moneys so stocked in said schooner, whether for freight or passage or whatever, shall be equally divided between the said Capt. Snow and Winsor, each party accounting for the above."

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Snow deposed, that he went to hire the vessel of the defendant, and it was agreed that he should have half of the net earnings for the use of her; and in conversation about the deponent's compensation as master, a commission of five per cent on the net earnings was talked of, but it was finally agreed that he should have eight dollars a month instead of commission, and their agreement was put in writing as above. He further deposed, that he made the contracts personally with the shippers of goods, including the plaintiffs; that the defendant gave him no orders whatever about the destination or employment of the vessel at any time; and that he had requested the deponent to write to him from time to time to let him know where the vessel was, where the deponent was going, and what his business was.

A verdict was taken for the defendant, subject to the opinion of the whole Court.

March 15th. *F. Dexter* and *Washburn*, for the plaintiffs. The deposition of Snow cannot be admitted to vary or explain the written contract between him and Winsor. This contract was not a charter-party, but Snow was the agent of Winsor. The vessel was not under the general control of Snow, for he was restricted to the business of freighting. No period was limited during which he was to have the vessel, and Winsor might have interfered at any time and dissolved the contract. All the acts done by Snow were within the scope of his authority as master. He had no power to appoint another person master: which is essential to a hiring. The share of the earnings which he was to receive, was merely a mode of paying his wages. If he had suffered the vessel to remain idle for several months, he would have been subject to an action for want of due diligence. In *Taggard* v. *Loring*, 16 Mass. R. 336, Jennings had the control of the vessel for a given period. He did not stand to the owner in the relation of master, and he might have appointed any other person master. In *Reynolds* v. *Toppan*, 15 Mass. R. 370, the vessel was "let and chartered" to Marshall for "the season." He was to employ her on his own account and at his own expense, and he might have appointed another master, and the vessel was not

337 a freighting ship By § 3 of *St.* 1818, *c.* 122, limiting the

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responsibility of ship-owners, "the charterer of any vessel, in case he shall navigate her *at his own expense*, shall be considered the owner, within the meaning of this act." This vessel was navigated partly at the expense of the defendant. *Clarkson* v. *Edes*, 4 Cowen, 480; *Parish* v. *Crawford*, Abbott (3d ed.), 21; *Fletcher* v. *Braddick*, 5 Bos. & Pul. 182.

The agreement was a contract of partnership. Snow and Winsor were to participate in the profits as such, and were entitled to an account one from the other. Both therefore are liable for the breach of the contract with the plaintiffs, and the non-joinder of Snow not having been pleaded in abatement, the action will be sustained against Winsor alone. Gow on Partn. 16, 17; Montag. on Partn. 7; *Hamper*, *Ex parte*, 17 Ves. 404; *Grace* v. *Smith*, 2 W. Bl. 998; *Waugh* v. *Carver*, 2 H. Bl. 235; *Cheap* v. *Cramond*, 4 Barn. & Ald. 663; *Langdale*, *Ex parte*, 18 Ves. 300; *Hesketh* v. *Blanchard*, 4 East, 144; *Purviance* v. *M'Clintee*, 6 Serg. & Rawle, 259; *Smith* v. *Watson*, 2 Barn. & Cressw. 401; *Sylvester* v. *Smith*, 9 Mass. R. 119; *Mumford* v. *Nicoll*, 20 Johns. R. 611.

C. G. Loring, *contrà*. The criterion of chartering is having the exclusive possession and control of the vessel, free from any right of the owner to interfere. Here Snow was to get the freight himself. There was no limitation as to the prices for which he should carry goods, or the places to which he should proceed. He was to victual and man the vessel at his own expense. The stipulation that Winsor should pay "eight dollars per month for one man's wages," was not a contract to pay wages, but merely to pay eight dollars a month. *Vallejo* v. *Wheeler*, Cowp. 143; *James* v. *Jones*, 3 Esp. R. 27; *Trinity House* v. *Clark*, 4 Maule & Selw. 288; *Saville* v. *Campion*, 2 Barn. & Ald. 503; *Frazer* v. *Marsh*, 13 East, 238; *M'Intyre* v. *Bowne*, 1 Johns. R. 229; *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 39; *Hallet* v. *Col. Ins. Co.* 8 Johns. R. 209; *Reynolds* v. *Toppan* and *Taggard* v. *Loring* before cited. It is objected that no time was fixed for Snow's retaining the vessel; but in this respect the contract is like a lease at will, and Winsor could not put an end to it without reasonable notice. It is objected, too, 338
that the vessel was restricted to freighting; but this is not in-

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consistent with chartering, any more than a stipulation that a house shall be used as a tavern, is inconsistent with a lease. Snow, it is said, could not have appointed another master; so a tenant at will cannot underlet. To show that Snow had not the control of the vessel, it was remarked that he would have been liable to an action if he had let her lie idle. This is true, and the reason is, that it was agreed she should be employed in freighting; but Snow might use her as he pleased in that business.

As a general rule, an agreement to share profits constitutes a partnership, but there are exceptions. Here however there was no division of profits, but of the gross earnings. If the voyage were long, Snow might lose while Winsor would gain. A division of net earnings would make a partnership. *Dry* v. *Boswell*, 1 Campb. 329; *Mair* v. *Glennie*, 4 Maule & Selw. 343; *Rice* v. *Austin*, 17 Mass. R. 205; *Muzzy* v. *Whitney*, 10 Johns. R. 226; *Jackson* v. *Robinson*, 3 Mason 138; *Wilkinson* v. *Frasier*, 4 Esp. R. 182; *Baxter* v. *Rodman*, 3 Pick. 435.

Dexter, in reply. In regard to Snow's being authorized to go where he pleased, it is common for the owner to authorize the master to proceed according to his discretion on a freighting voyage. The sum of eight dollars per month is stipulated to be paid as the average rate of wages, and it is wages *eo nomine*. Admit the contract to be like a lease at will, and that Snow was entitled to reasonable notice, Winsor could put him out immediately for misconduct; and in this the case at bar differs from *Taggard* v. *Loring*.

June 26th. PARKER C. J. In the case of *Reynolds* v. *Toppan*, 15 Mass. R. 370, it was determined, that the owner of a vessel under charter, the hirer having the whole control of the vessel for the time, to victual and man her and pay over a portion of the net proceeds to the owner for the use of the vessel, was not liable to the shippers of goods on board the vessel, which had been embezzled or otherwise not accounted for by the master.[1] In that case the English authorities cited on the present occasion were duly considered by the

[1] See Revised Stat. *c.* 32, § 3.

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Court and therefore will not be commented upon: and in the case of *Taggard et al.* v. *Loring*, 16 Mass. R. 336, the same principle is recognised, and is applied to a contrac of hire of the vessel which existed only in parol. So that the inquiry in the present case can be only, whether there exist any circumstances which distinguish it from those which have been thus decided.

And first it is insisted, that in the cases decided, the letting the vessel was for a certain determinate period; in one case for six months, and in the other for the season; whereas in the present case there is no provision for the duration or the termination of the contract.

It is not perceived that any difference in regard to the liability of the parties can result from this circumstance, for although the contract was determinable at the will of the owner of the vessel, yet, as in other contracts of a similar nature, this right is subject to the qualification, that it could not be rescinded while the vessel was actually employed in business pursuant to the contract; so that it was an absolute and indefeasible hiring of the vessel for every voyage she should have undertaken until notice was given by the owner of his intention to discontinue it.

The principle of ownership *pro hac vice* by the hirer would apply to every voyage undertaken by him before he should receive notice from the owner that he chose to terminate the contract. For this we cite no authority, for no case like the present has been found; but it results from the nature of the contract and the rights of the party under it, and is analogous to the case of leases at will of real estate, which cannot be terminated but by mutual consent, unless the lessor gives reasonable notice to quit.

It is also thought that the clause in the agreement, which provides that the defendant, the owner, shall be accountable for the wages of one man at eight dollars per month, constitutes a substantial difference between this and the cases decided; but, on reflection, we consider this only as a means of ascertaining the charges upon the earnings before a division shall be made between the charterer and the owner. It is no more than if the parties had agreed that the earnings should

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be divided, except that eight dollars per month should be deducted from the defendant's share. [1]

As to the question of copartnership between the defendant and Snow in the employment and earnings of the vessel, we think it cannot be predicated on the facts appearing in this case, any more than in all the cases in which the charter of the vessel was agreed to be paid by a portion of the earnings. [2]

Judgment according to verdict

RALPH HUNTINGTON *versus* THE AMERICAN BANK

Paying money into court upon a *quantum meruit* count, is an admission of the contract as alleged.

Where by the vote of the directors of a bank, the plaintiff was appointed special director, to receive such compensation as "should in the opinion of the board be reasonable and fair," and he declared for a reasonable compensation in a *quantum meruit* count, and the defendants paid into court the amount voted by the directors to be a "reasonable compensation," it was *held* that by paying the money into court, the defendants waived this limitation of the contract.

ASSUMPSIT. The plaintiff declared for the sum of 1500 dollars, *first*, in *indebitatus assumpsit* on an account annexed to the writ, for his services as special director of the bank; *secondly*, that the defendants, in consideration that the plaintiff, at their special request, had performed certain services in and about their banking affairs and concerns, promised to pay him on demand so much money as he reasonably deserved to have, &c. The defendants pleaded a tender of 300 dollars and paid that sum into court; which was taken out by the plaintiff; and as to the residue, they pleaded that they never promised; upon which issue was joined.

At the trial, before *Wilde* J., the records of the following votes were produced, *viz.* "At a meeting of the directors of the American bank, December 4th, 1824, it was voted, that

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[1] See *Thompson* v. *Hamilton*, 12 Pick. 428; *Perry* v. *Osborne*, 5 Pick. (2nd ed.) 423, and note 1; 3 Kent's Comm (3d ed.) 136 to 138, and cases cited, Abbott on Shipping (4th Am.) ed. 22 and note.

[2] See *Thompson* v. *Snow*, 4 Greenl. 264.

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it is expedient that some one of the directors of said bank should be designated to act as a special director, till the further order of this board, whose duty it shall be to attend constantly at said bank, during bank hours, and aid the director of the week in the discharge of the duties of his office." Voted, "That the director thus specially designated, shall receive from time to time, as a compensation for his services, such sum or sums as shall be, in the opinion of this board, considered a reasonable and fair compensation." Voted, "That Ralph Huntington, one of the directors of said bank, be designated a special director of said bank, for the purposes aforesaid, and upon the terms aforesaid."

The plaintiff then offered evidence to prove the amount of his services as such special director, and that he deserved to have therefor a greater sum than 300 dollars. Whereupon the counsel for the defendants produced the record of the following vote of the directors; *viz.* "At a meeting, Sept. 20th, 1825, voted, that the compensation to be given to Mr. Huntington, for his services, during the time he acted as special director of this bank, be three hundred dollars." And the defendants' counsel contended, that the plaintiff was bound by his contract with the bank to accept that sum as a full compensation for his services; and objected to the admission of testimony to prove the amount and value of his services. The objection was overruled, the question being reserved for the whole Court, and the testimony was admitted.

The jury found a verdict for the plaintiff for the sum of 100 dollars, after allowing for the sum paid into court.

The question principally argued was, whether the defendants, by paying the money into court generally, without designating the count on which it was paid in, and by pleading generally to the rest of the declaration, that they had never promised, had waived the limitation of the plaintiff's compensation to "such sum or sums as should be, *in the opinion of the directors*, considered reasonable and fair."

S. D. Ward, for the defendants, contended that to the first count they could not safely have pleaded any other plea than that of a tender. If the general issue had been pleaded, the plaintiff would have been entitled to recover 300 dollars on

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the first count. The contract proved by the defendants had been performed and that sum had become due upon it before the commencement of the action; and it is a well settled principle, that, *where a special contract has been performed*, and the remuneration was to be in money, the common *indebitatus* count is sufficient. 1 Chit. Pl. 339. The plaintiff, having claimed 1500 dollars, would have been entitled to recover the less sum of 300, upon the defendants' own showing. The first count, then, and the contract proved, are not inconsistent. A tender to this count, therefore, is not an admission of a different contract from the one proved.

The second count is to be considered, in regard to this action, as substantially the same as the first; being to recover a compensation that might as well have been recovered under the first, and amounting to the same thing in its legal effect. 2 Chit. Pl. 6, note (*t*). If this position is correct, then if the tender would have been good to the first count, and would not have admitted a contract different from the one proved, it is good to the second count; and the objection that the contract set forth in the second count, and the one proved, are different, falls to the ground.

But the defendants contend that the *quantum meruit* or second count, does not set forth a different contract from the one proved. The contract proved is only a *limitation* of the one set forth; that is, if we consider the second count as meaning precisely what it says, and not as a mere general *common* count, adopted for convenience, and stating one thing when it admits of a different thing being proved. This count states that the defendants promised such a compensation as the plaintiff reasonably deserved to have, and the contract proved was, that he was to have such a compensation as the directors should think reasonable. He was to have a *reasonable* compensation in both cases, but, in the latter, it was to be limited to such sum as the directors should think fit. In an action against a carrier for not carrying goods safely, the defendant paid 5 *l.* into court, and it was contended that he thereby admitted the contract declared upon. But the court permitted him to give in evidence a general printed notice, that he would not be answerable for any amount over that sum, unless the

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goods were entered and docketed in a particular manner. Though he admitted that he was bound to carry the goods safely, yet he was allowed to show, that by an agreement, (for it amounted to that,) he was not to pay more than the sum tendered, unless a certain condition was performed. So in the present case, it was competent to the defendants to show that the amount of what was a *reasonable* compensation, depended on a condition or a contingency. See Peake's Ev. 203, 204, and cases there cited. 343

A tender and payment of money into court, are an admission of a special contract only, and the principle does not apply to the common counts. This is shown by all the authorities which were cited for the plaintiff; which are cases of special contracts; and no instance can be found in which the principle has been decided to apply to the common counts. 1 Dunlap's Pract. 423. One reason for this distinction is, that, in a special declaration, the facts must be proved as stated, and a tender and paying money into court may be an admission of the facts so stated. But, in the common counts, the facts need not be proved as stated; they are in many respects legal fictions. Under an *indebitatus assumpsit*, a *quantum meruit* or *quantum valebat* may be proved; and a *quantum valebat*, under a *quantum meruit*. 5 Dane's Abr. 503, 504. Under the count for *money had and received*, a note of hand may be given in evidence; or any thing showing that "*ex æquo et bono*," the defendant is indebted to the plaintiff; and so of the other money counts. If a tender is made under a count for *money had and received*, would it be an admission of the note or other written contract offered to support this count? Would not the plaintiff be obliged to make out his whole case, as if no money had been tendered, except as to the sum tendered? Both parties know that the common counts are in some degree fictitious, and not a true statement of the plaintiff's case; and the court will view the intention and understanding of the parties. *Muller* v. *Hartshorne*, 3 Bos. & Pul. 556. How can it be said that the defendant has admitted on the record a statement that is known to be a mere fiction of law? It must have been from considering these counts as fictitious, that Lord *Holt* was led to make the remark, that "he 344

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was a bold man who first ventured upon these common counts." It is apparent to the court, that the plaintiff has not stated his facts in his declaration, as he intends and expects to prove them. It would seem strange that the defendants should be held to have admitted facts that were never intended or expected to be proved; and which the plaintiff was not bound to prove, to make out his case. In a special count, it would be otherwise; as on a bill of exchange, it may be said a tender admits the execution of the bill, for the defendant knows this last must be proved before the plaintiff can recover.

This distinction, in respect to special and general counts, is fully supported in 5 Dane's Abr. 512; and a case is mentioned in the same volume, *p.* 505, 506, where there were general and special counts, and money paid in was applied by agreement of the parties to all the counts, and the plaintiff contended that the defendant had thereby admitted the special contract; but the court said "the defendant could not have intended to admit what would defeat his defence."

The authority already referred to (5 Dane's Abr. 503, 504,) shows that *indebitatus* and *quantum meruit* counts are substantially the same, for the author, after saying money cannot be paid into court where the damages are uncertain, adds, "so it was once held as to *quantum meruit*, but of late, money, in *quantum meruit*, has been allowed to be brought into court, and generally when *indebitatus assumpsit* is the proper action, *for the damages are certain.*" By this authority the two counts are considered to be substantially the same. But if the *quantum meruit* is considered to mean what its terms literally import, *viz.* a promise to pay what the plaintiff "reasonably ought to have," the damages would most assuredly be uncertain, and the tender, in this action, to the *quantum meruit*, would be a bad plea; and the plaintiff having taken issue instead of demurring, the court would not, under these circumstances, draw the same legal inference from a bad plea, that they would from one that was good.

Fletcher, for the plaintiff. The second count alleges, that in consideration that the plaintiff, at the special request of
345 the defendants, had performed certain services for them in and bout their banking business, they promised *to pay* him there

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for *so much as he reasonably deserved to have*, and then alleges that he reasonably deserved to have 1500 dollars. This is technically and specifically a special count, and sets out a special contract. This is the old form, as used before the introduction of general counts; and it was the change from this very form that Lord *Holt* pronounced to be the work of a bold man. The only difference between the ancient special mode of declaring and the late more general form, is, that, in the former, the manner and nature of the work and labor were set forth in the declaration, as in this second count; and the latter does not state these particulars.

By bringing money into court the defendants admit the entire contract, as stated in the second count; they necessarily admit also, that there is due to the plaintiff as much as that contract entitles him to, which is all a jury should think he reasonably deserved. 5 Dane's Abr. 512. This principle is confirmed in a great number of cases. *Johnston* v. *Col. Ins. Co.* 7 Johns. R. 315; *Yate* v. *Willan*, 2 East, 132; *Burrough* v. *Skinner*, 5 Burr. 2640; *Watkins* v. *Towers*, 2 T. R. 275; *Middleton* v. *Brewer*, Peake's Cas. 15; *Bennett* v. *Francis*, 2 Bos. & Pul. 550.

The defendants' plea expressly admits the promise as alleged in the declaration, and puts in issue nothing but the amount which the plaintiff reasonably deserved to have; and that question is expressly referred to the jury; so that under the plea, the only pertinent evidence was the evidence offered, and which is objected to. If that evidence is inadmissible, nothing could be proved under this issue. The defendants say the contract alleged, and the one proved *by them*, are not different: if so, there can surely be no objection to the verdict. But then it is said, the contract proved by them is a *limitation* of the one alleged. This is clearly contradictory to the former position. It is also said the two counts are the same. This contradicts directly what appears by the counts themselves, and in all the books they are put down as different; and the citation from 2 Chit. Pl. which says they are not always both necessary, clearly supposes them to be different. 346

It is said these counts are fictitious; but it is difficult to tell

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in what the fictions consist; the second count is as dry a matter of fact as could well be framed.

It is said that bringing money into court is an admission of a *special* contract *only*. It would be difficult to find a reason or authority for this. The principle clearly is, that paying money into court admits the entire contract as alleged. There is no distinction as to the kind of contract.

But suppose the contract not admitted as alleged, it is submitted, that the contract which appears by the case is, in fact and effect, the same that is set out in the declaration. It is a contract for reasonable compensation, and the plaintiff may well maintain an action for such compensation. The condition, that the compensation should be determined by the opinion of the directors, is like the condition in a policy, that disputes shall be referred to arbitrators; which does not preclude the party from bringing his action at law, and trying his case by jury.

June 26th. WILDE J. delivered the opinion of the Court. The defendants pleaded a tender as to 300 dollars, part and parcel of the several sums claimed by the plaintiff, and at the trial contended that the plaintiff had not made out any legal right or title to further damages; because it appeared by the votes of the corporation, that the plaintiff was to receive, from time to time, as a compensation for his services, such sum or sums as should be, in the opinion of the board of directors of the bank, considered as a reasonable and fair compensation; and because it appeared that the board of directors did vote and determine that the plaintiff's compensation for his services should be limited to the sum of 300 dollars. It was ruled at the trial, that the plaintiff was not bound to accept the compensation voted by the directors, unless the jury should be of opinion that the sum voted was a reasonable compensation; and the question, whether it was a reasonable compensation, was submitted to the jury upon the whole evidence.

347 As the pleadings are, and taking into consideration the legal effect of the tender, we are of opinion that the question as to reasonable compensation was properly left to the determination of the jury. The defendants, by tendering the sum of 300 dollars and bringing it into court on both counts in the declaration, must be considered as admitting the several prom

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ises as set out in the declaration; indeed there is an express admission in the defendants' plea to this effect. The words are, "because they say, that after the making of the said several promises and undertakings in the said declaration mentioned," &c. This clearly is an express admission that the defendants did make the several promises declared on; and they are estopped to deny that these promises are truly stated; nor can they add to them any qualification or limitation of their own liability; and if there was evidence to this effect, it could have no legal effect against the defendants' express or implied admission to the contrary.

As to the implied admission, it has been argued that the payment of money into court and a tender, is an admission of a special contract only, and does not apply to the common counts. We do not perceive any very good reason for this distinction; but if there is any such distinction, it can only go to the exclusion of cases founded on implied promises. The case of *Bennett* v. *Francis*, 2 Bos. & Pul. 550, was on an implied promise for goods sold and delivered, and the bringing money into court was held to be an admission of the contract as stated in the declaration. The case at bar was founded on an express promise, or, in other words, on a special contract between the parties, and not on a promise implied by law. That part of the agreement, which referred the question as to the amount of compensation to the board of directors, has been waived by the parties. There is therefore both an implied and express admission, that the defendants made the contract as stated in the plaintiff's declaration.[1]

This is not like the case of *Clarke* v. *Gray et al.*, 6 East, 564, which was a case against common carriers, who had given notice that they would not be responsible for more than £5 for the loss of any goods, unless such goods were entered and paid for as of a higher value. The goods in that case were of a higher value, and the declaration was in the common form, but the defendants were allowed to bring £5 into court, and it was held a good bar to the plaintiff's recovery of further

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[1] See *Seaton* v. *Benedict*, 5 Bingh. 31; 2 Stark. Ev (5th Am. ed.) 600 to 603; *Jones* v. *Hoar*, 5 Pick. (2nd ed.) 291, note 1; *Cox* v. *Brain*, 3 Taunt. 95; *Bulwer* v. *Horne*, 1 Nev. & Man. 117.

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damages. The contrary doctrine was held in the case of *Yate* v. *Willan*, 2 East, 128, but we think the case of *Clarke* v. *Gray et al.* was rightly decided on the distinction, that the notice by the defendants amounted only to a limitation of the damages to be recovered in the event of the breach of the contract of carriage, and not to a qualification of the contract itself. That case was expressly decided on that ground, so that the decision does not militate against the rule in question.

We are of opinion, therefore, that the question as to what was a reasonable compensation for the plaintiff's services was a question for the jury to determine, and that the plaintiff is entitled to judgment according to the verdict.

JOSEPH L. LORD *versus* LUKE BALDWIN.

In the case of a dormant partnership, an attachment of the stock in trade in the hands of the ostensible partner, in a suit against him alone, has preference to a subsequent attachment of the same goods by another person in an action against the partners.

Where the stock in trade in a shop occupied by A, was attached first by B and then by C, in suits against A alone, and each recovered judgment and took out his execution, and afterwards, in a suit by D against A and B jointly, the jury found that B was a dormant partner of A, it was *held*, nevertheless, that C was not entitled to have his execution levied on the property in preference to B's execution, for that B was not estopped, except in the suit of D, to deny the copartnership.

THIS was an action of the case against the defendant, a deputy sheriff, for neglecting to levy an execution in favor of the plaintiff against John Brown, upon certain goods which had been attached by the defendant, upon the original writ, as the property of Brown. Brown carried on business in his own name alone, and the goods were in his shop as stock in trade.
349 Before the plaintiff attached, there had been three attachments of the same goods in favor of W. Lawrence, the Dorchester Iron Company and Aaron Brown, in suits against John Brown alone; in which suits judgments were obtained and executions were duly issued and delivered to the defendant. Soon after these attachments, by the consent of all parties, the goods were sold by the defendant pursuant to law. The defendant paid to Lawrence and the Dorchester Iron Company the amount of

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their respective executions, and to Aaron Brown a certain sum in part satisfaction of his execution; retaining in his hands enough of the proceeds to satisfy that execution in full, and the plaintiff's execution in part.

After the foregoing attachments, Bogart & Co. sued out their writ of attachment against John Brown and Aaron Brown, charging them as *copartners*, and on this writ the defendant attached the same goods as copartnership property. On the trial of the action, upon the question of copartnership, Bogart & Co. obtained a verdict, and judgment was rendered in their favor against John and Aaron Brown; and the defendant was notified to hold the proceeds of the stock to satisfy the judgment.

The debt upon which the judgment in favor of Bogart & Co. was rendered, arose from the sale of goods to John Brown, and the goods made part of the stock in the store; and the other debts, except the one due to Aaron Brown, arose in the same way; it being unknown that a copartnership existed between John and Aaron Brown.

If the Court should be of opinion that the existence of a dormant partnership, unknown to all the parties who dealt with John Brown, did not give Bogart & Co. priority of security upon the goods as partnership property, the defendant was to be defaulted.

Fletcher, *Rand* and *Morse*, for the defendant, being called upon to begin, contended that the stock in trade which was attached was the joint property of John and Aaron Brown, and that consequently Bogart & Co., being partnership creditors, were entitled to have their execution satisfied in preference to that of the plaintiff, who was a creditor of John Brown alone. The plaintiff is estopped by his judgment to say his debt was against John and Aaron jointly. *March 28th.*

Loring, *contrà*, cited *Smith* v. *Watson*, 2 Barn. & Cressw 401; *Hamper*, *Ex parte*, 17 Ves. 404; *Brinckerhoff* v. *Marvin*, 5 Johns. Ch. R. 320; *George* v. *Clagett*, 7 T. R. 359; *Stracey* v. *Deey*, ibid. 361, note; *Morley* v. *Strombom*, 3 Bos. & Pul. 254; *Ex parte Enderby*, 2 Barn. & Cressw. 389. He contended that the plaintiff's claim was entitled to be pre- 350

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ferred, not only to that of Bogart & Co., but likewise to that of Aaron Brown.

PARKER C. J. delivered the opinion of the Court. The question presented in this case is entirely new; no authorities have been cited, nor have we been able to find any which bear very strongly upon it.

The plaintiff made the third attachment upon the goods apparently belonging to John Brown, to secure his debt.

The defendant had sufficient funds in his hands, the proceeds of the goods attached, to satisfy the judgment in this suit, in whole or in part, if he is not obliged in law to appropriate them to the satisfaction of another judgment obtained by Bogart & Co. against John and Aaron Brown, who made their attachment on the same goods, after the attachment made by the plaintiff; and the right of priority is supposed to be in Bogart & Co., because John and Aaron Brown are found to be partners, having a joint interest in the stock of goods which were attached, upon the principle that the partnership fund is to be applied to the payment of partnership debts, before a separate creditor of one of the firm can be allowed to resort to it for satisfaction of his debt. The principle is well settled, having been first applied to cases of distribution under commissions of bankruptcy. But it is a reasonable principle, and has been adopted and enforced by this Court in the case of *Pierce* v. *Jackson*, 6 Mass. R. 242, and is there said to be a principle of the common law.

It is only the application of this principle to cases as they arise, which can afford any room for argument or doubt, and in order to determine such question, the reason of the rule must be sought for, and the particular case must be brought within the reason, as well as within the terms of the law.

351 The basis upon which the rule rests, is, that those funds shall be liable upon which the credit was given. Those who sell goods or make contracts with a company or firm, are supposed to trust to the ability or property of the firm. Those who trust the individual member, rely upon his sufficiency alone. The former are equitably entitled to be first paid out of the joint stock, and if after paying all the debts there is still a surplus, that is the property of the individuals

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in proportion to their interest in the common fund, and to that extent only is it liable to the creditor of the individual. In the case of common public partnerships there is no difficulty in applying the principle, and in case of bankruptcy or insolvency it is the fair mode of distribution of the effects.

But the case before us is that of a dormant partnership, which is necessarily, from its very character, unknown at the time the liability is incurred. All the creditors sold their goods or made their contract with the ostensible, visible partner: they trusted to him personally, and to the goods upon which he was trading as his. The dormant partner is brought to light by *ex post facto* investigation, and he is made responsible, not because he was trusted, but because he secretly enjoyed the profits of the business. Now in such case, the reason for giving preference to such creditors as may first discover his liability, so that stock ostensibly belonging to the visible partner shall first be applied to the satisfaction of their debts, does not exist. Even if he owned the whole of the stock, as between him and the known man of business, still it is in law the property of the latter, for he is allowed to claim and use it as his alone, and thus lead persons to trust him upon the faith of the goods in his possession.

Whether a private creditor of his could seize property so situated and hold it against the creditors of the ostensible owner, is a question of a different nature.

The question now is, whether, when all the creditors have trusted the man of business and apparent owner of the goods, any one of them who is behind the rest in his attachment, shall supplant them and gain priority because he has discovered this concealed liability. At the time the debt was created, he stood upon the same footing with the rest; he trusted John Brown and the goods in his possession; so did they. They have taken possession first of the fund which was held out to the public as the means of credit, and it might be, and probably was in this very case, that the goods attached are the identical goods which they sold to the party sued. There would be then no pretence of equity, and we think not

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of law, in allowing a preference founded upon no meritorious distinction of circumstances.

That this question has not arisen before, is owing perhaps principally to the fact, that most of the dormant partnerships have been such as have resulted from a loan of money to be employed in the partnership concerns, where the receipt of a part of the profits of the business has been the compensation for the loan. The silence of the books themselves seems evidence of the unsoundness of the doctrine now sought to be applied. It is considered that the mere fact of liability as a partner does not give an interest or ownership in the stock in trade; the whole may have been purchased for and in the name of the visible partner, and it usually is so in cases of dormant partnerships. The property then is not the dormant partner's to the prejudice of those who trust him who carries on the business and obtains the credit. *Ex parte Enderby*, 2 Barn. & Cressw. 389; *Smith* v. *Watson*, ibid. 401; *George* v. *Clagett*, 7 T. R. 359, 361, note.

So far as the cases of dormant partnership have been discussed, the opinions advanced have been of a contrary tendency. Thus an action may be maintained by the ostensible partners, without joining a dormant partner, against a person who dealt only with the ostensible partners. Montagu, 182; *Leveck* v. *Shaftoe*, 1 Esp. R. 468.[1] This shows that whether the action is to be affected or not, depends upon the parties with whom the contract is made.

So in an action brought by ostensible and dormant partners the defendant may set off a debt due from the ostensible partner only. Montagu, 182; 7 T. R. 359; *Lloyd* v. *Archbowle*, 2 Taunt. 324.[2]

353 In the case of *Curtis* v. *Perry*, 6 Ves. 747, the following case is stated by the Lord Chancellor as having occurred, though there seems to be no report of it. Three persons,

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[1] See Collyer on Partn. 393; *Mitchell* v. *Dall*, 2 Harr. & Gill, 159; *Clarkson* v. *Carter*, 3 Cowen, 84; *Barstow* v. *Gray*, 3 Greenl. 409; *Robson* v. *Drummond*, 2 Barn. & Adol. 303; *Clark* v. *Miller*, 4 Wendell, 628.

[2] See Revised Stat. *c.* 96, § 9; Collyer on Partn. 447; *Rose* v. *Murchie*, 2 Call, 409.

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partners in a manufactory in Lancashire, sold their goods in London in the names of two of them only. A credit therefore was acquired by them all in Lancashire, and by two in London, which affected the distribution of their property. And in 2 Barn. & Cressw. 401, it is said, if a secret partnership could be set up as an answer to assignees claiming property which had been left in the order and disposition of the bankrupt, as apparent owner, enormous debts, unconnected with the partnership business, might be contracted upon the credit gained by the possession of property, which a person wholly unknown to the creditors might claim, to the exclusion of their just demands.

Finding therefore that this is a first attempt to maintain the preference which is sought for in this action, that the meritorious ground of preference in other cases does not here exist, and that the analogical reasoning upon cases which have been decided is against the defendant, we are of opinion that the plaintiff is entitled to recover of the deputy sheriff so much as remains in his hands of the proceeds of the property attached, after satisfying the execution of Aaron Brown.[1]

Loring inquired of the Court, whether the plaintiff was not entitled to the whole, and not merely to the surplus, as he was in fact a creditor of the partnership.

Per Curiam. We could not determine that point in favor of the plaintiff, without notice to Aaron Brown. The judgment against him and John is binding upon him only for that suit; in another he might be able to show that there was no partnership.

[1] See *French* v. *Chase*, 6 Greenl. 166.

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ISAIAH WOODWARD *versus* JOHN B. TREMERE *et al.*

A judgment recovered in another of the United States against a citizen of Massachusetts, who at the commencement and during the pendency of the action was not within such State, and never was served with process, nor ever appeared to the action, though he had knowledge of its being commenced, is not binding upon him in Massachusetts.

DEBT on a judgment of a Court of Pleas and Quarter Sessions in North Carolina.

The defendants' *second* plea was, that during the pendency of the original action and at the time when the judgment was rendered, they were inhabitants of and residents in Massachusetts, and not within the jurisdiction of the court in North Carolina. The *third* plea was, that no writ or process, upon which the judgment might have been founded, was ever served upon either of the defendants, and that they did not appear and plead to such supposed writ or other process. In the *fourth* plea the averments of the second and third were united.

The replication to these three pleas alleged, among other things, that the plaintiff purchased a writ out of the court in North Carolina, and by virtue thereof the sheriff attached a schooner, the property of the defendants, then lying in North Carolina; that the writ was entered at the May term 1822, of the court, and in pursuance of an order of the court, notice of the process and attachment was published in a newspaper; that on the 13th of July 1822, one Demille was summoned as garnishee of the defendants, and at the August term he disclosed that he had in his hands a sum of money belonging to the defendants, and the court thereupon ordered the same to be paid over to the plaintiff; that on the 16th of the same July, Cushing & Bonner, merchants in North Carolina, were summoned as garnishees of the defendants, and at the August term they appeared and filed their garnishment; that at the time of the service of the process upon them as gar-
355 nishees, and until the rendition of the judgment, they were the duly authorized agents of the defendants in relation to the suit; that the defendants had actual and seasonable notice of

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the writ, attachment and other proceedings, and full opportunity to appear and defend against the action, and that they did employ counsel practising in the Court of Pleas, &c. to aid, advise and direct them in regard to the action.

To this replication the defendants demurred specially, assigning as one cause, that it is argumentative, inasmuch as it does not aver that they were residents or inhabitants within the jurisdiction of the Court of Pleas &c. at the commencement or during the pendency of the suit, nor that they were duly served with process, nor that they ever appeared or pleaded, the negative of which facts is directly averred in the pleas, but it avers that the defendants had notice in season to appear and defend the suit, which is no sufficient, direct and positive answer to the averments in the pleas.

Curtis argued in support of the demurrer, and referred to several of the cases cited in *Hall* v. *Williams et al.*, *ante* p. 232. *March 28th.*

Cooke, *contrà*, relied upon the argument made for the plaintiff in that case.

Per Curiam. The general principle determined in *Hall* v. *Williams et al.* [1] applies to the case now before us. It is true the plaintiff has averred that the defendants had notice of the pendency of the original suit, but there was no service of process upon them, and no appearance on their behalf. *June 26th.*

Replication adjudged bad.

Selden Braynard *versus* Jabez Fisher.

Assumpsit on a negotiable note made by the defendant to one Whiting, and by him indorsed to the plaintiff when overdue. At the trial the defendant produced several notes made to him by Whiting, which he offered to set off against the note in suit; but the Court now *held* that they could not be allowed, as they had not been regularly filed in set-off, pursuant to the statute. A new trial was however granted, that the defend- 356

[1] See this decision, *ante*, 232, and cases cited in the notes to it.

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ant might have an opportunity to show that they were given as evidences of payment of the note in suit. See *Sargent* v. *Southgate*, 5 Pick. 312. [See 2nd ed. 317 to 322 and cases cited in the notes.]

S. D Parker, for the plaintiff.

S. D. Ward, for the defendant.

JOHN BREED *versus* JOSEPH HURD.

A witness told the plaintiff that the defendant had left money with him to pay the plaintiff's bill, and that if the plaintiff would make it right, by deducting a certain sum, he would pay it, at the same time making a motion with his hand towards his desk, at which he was then standing; and he swore that he believed, but did not know, that there was money enough in his desk, but if there was not, he would have obtained it in five minutes if the plaintiff would have made the deduction, but the plaintiff replied that he would deduct nothing. *Held* that this was not a tender.

ASSUMPSIT to recover the price of a quantity of salt hay and sedge grass. The defendant pleaded a tender of a certain sum. A verdict, finding that a tender was made, was taken by consent, subject to the opinion of the Court upon a case reserved.

Early in July, 1826, the plaintiff, by the defendant's direction, sent his account to the store of Fosdick & Tufts. Afterwards, and before the suit was commenced, the plaintiff was at the store, when Fosdick told him the defendant had left money with him to pay the bill if he would make it right, and if he would deduct one dollar a ton from the charges for the hay, he (Fosdick) would pay the bill; at the same time making a motion with his hand towards his desk, at which he was then standing. Fosdick swore that he believed, but did not know, that there was money enough in his desk to pay the bill, according to his offer, but if there was not, he would have obtained it in five minutes, if the plaintiff would have made the deduction, but the plaintiff replied that he would deduct nothing. As the plaintiff was leaving the store, the witness asked him if they had not better divide the difference; to which he answered, No.

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Breed v. Hurd. April 1st.

The question was, whether the offers and doings of Fosdick, as the agent of Hurd, amounted to a tender.

S. D. Ward, being called upon to show that this was a tender, argued, 1. that the actual production of the money was unnecessary, the plaintiff having declined to accept it; *Harding* v. *Davies*, 2 Carr. & Payne, 77; *Black* v. *Smith*, Peake's Cas. 88; *Read* v. *Goldring*, 2 Maule & Selw. 86: — 2. that the offer was to pay the amount of the bill, deducting one dollar a ton, without any condition, or if there was a condition, yet as the tender was not objected to on that account, but only because the sum offered was not large enough, the plaintiff could not now make the objection. *Cole* v. *Blake*, Peake's Cas. 179; *Cadman* v. *Lubbock*, 5 Dowl. & Ryl. 289.

Peabody, *contrà*, cited *Dickinson* v. *Shee*, 4 Esp. R. 67; *Glascott* v. *Day*, 5 Esp. R. 48; *Loring* v. *Cooke*, 3 Pick. 51; *Thayer* v. *Brackett*, 12 Mass. R. 450; *Evans* v. *Judkins*, 4 Campb. 156.

June 26th.

Per Curiam. To our surprise, there are cases very nearly like this, where the offer was held to be a valid tender; as in *Harding* v. *Davies*, 2 Carr. & Payne, 77, where a woman stated "that she had the money up stairs." Here the witness said he could get the money in five minutes. We all think this was not a tender. The party must have the money about him, wherewith to make the tender, though it is not necessary to count it. We think there was not a tender here, even on the broad cases in England.[1]

Defendant defaulted.

[1] See *Kraus* v. *Arnold*, 7 Moore, 59; *Leatherdale* v. *Sweepstone*, 3 Carr. & Payne, 342; *Sargent* v. *Graham*, 5 N. Hampsh. R. 440; *Fuller* v *Little* 7 N Hampsh. R. 535.

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JOHN G. WARD *et al.* *versus* GEORGE O. LAMSON and Trustees.

Where a debtor makes a general assignment of his property in trust for the benefit of his creditors, a creditor who by a trustee process attaches the funds in the hands of the assignees, will be entitled to payment, in preference to creditors who execute the assignment subsequently to the attachment.

Where such assignees employed the debtor himself to collect for them the proceeds of certain property included in the assignment, in another State, which he did, and before he paid over the same, the assignees were summoned as his trustees, it was *held*, that they were chargeable as such, the debtor being considered as their servant, and a receipt of the money by him as a receipt by themselves.

ASSUMPSIT. By the answers of the respondents, who were summoned by virtue of the trustee process, it appeared that on the 24th of May, 1827, Lamson made to them a general assignment of his property, consisting of chattels and choses in action, in trust to pay his creditors, who should become parties to the assignment, some of them in full and others in proportion to the amount of their respective debts. On the 6th of June, when the process was served on the trustees, the assignment had been executed by creditors whose demands amounted to 4390 dollars, and the property which had then come into the actual possession of the trustees amounted to 3842 dollars. Some virgin silver and tortoise-shell, included in the assignment, were never in the actual possession of the respondents, but at the time of the execution of the indenture were in the hands of certain merchants in New York, and Lamson undertook to obtain the proceeds for the respondents. He accordingly collected 2622 dollars, the proceeds of the silver and tortoise-shell, and deposited the same in the Beverly bank in his own name, a few days before the service of process upon the respondents, and after the service he paid the amount to them in bills of that bank. This amount, together with the sum received by the respondents before the service of the writ, was sufficient to pay the debts of the creditors who had signed the indenture before that time, and likewise the debt due to the plaintiffs. Other creditors subsequently executed the assignment.

359 *Bassett*, for the plaintiff, cited Paley on Princip. & Ag

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189; *Matthews* v. *Haydon*, 2 Esp. R. 509; *Duke of Norfolk* v. *Worthy*, 1 Campb. 337.

Ward v. Lamson and Tr.

April 1st

C. G. Loring, for the trustees.

Per Curiam. The question made in another case this term, meets us likewise in this, namely, whether the plaintiffs will hold the funds, by virtue of their trustee process, in preference to the creditors who signed the indenture subsequently to this attachment. We did not anticipate that such a question would have been made. For twenty years it has been considered to be law, that if an attachment is made before any creditor has become a party to the assignment, the attachment will hold. So if it is made after some have signed the indenture, the attaching creditor will have a priority to subsequent signers. Otherwise, as it cannot be known whether creditors will or will not execute the assignment, the property would be locked up. We think this is not now an open question.[1]

The point however relied on by the respondents is, that they had not sufficient funds in their hands at the time of the service of the trustee process, to pay the debts of those creditors who had previously become parties to the assignment. Besides the money actually received by them, there was property in New York, comprehended in the assignment, the proceeds of which they employed the debtor to collect for them. We think that he received the money as their servant, and that when it was received by him, they became accountable for it. As this sum, together with the funds previously in their hands, is more than sufficient to pay the debts of the creditors who executed the indenture before the service of this process, the respondents must be charged as trustees.

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[1] See *Brewer* v. *Pitkin*, 11 Pick. 298; *Leeds* v. *Sayward*, 6 N. Hampsh. R. 83; Cushing on Trustee Process, § 55, *p.* 30, and cases cited in note 2; *Bradford* v. *Tappan*, 11 Pick. 76; Angell on Assignments, 168 *et seq.*

It has since been provided, that assignments made to creditors, or to any one or more assignees or trustees for the use of creditors, according to the provisions of *St.* 1836, *c.* 238, shall be valid and effectual against any attachment or execution thereafter made or levied on any of the property assigned provided the debtor make oath, &c. *St.* 1836, *c.* 238, § 1. But the whole subject of assignments is now regulated by *St.* 1838, *c.* 163, *quod vide.*

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JOHN HALLIDAY *versus* JOHN DOGGETT *et al.*

THE plaintiff, being a partner of a manufacturing house in Scotland and their agent for exporting goods to this country, consigned certain carpets to a commission merchant in Boston, by whom they were sold to the defendants; and this action was brought to recover the price. The Court, under the general issue, now ordered a nonsuit on account of the non-joinder of the other owners of the goods, observing that the action should have been in the names of all the owners, or in that of the agent who made the contract.[1]

Sullivan, for the plaintiff, cited 1 Saund. 154, 291*f*; *Rice* v. *Shute*, 5 Burr. 2611; *Sargent* v. *Morris*, 3 Barn. & Ald. 280; *Skinner* v. *Stocks*, 4 Barn. & Ald. 437

Curtis, for the defendants.

GEORGE A. HODGES *versus* SAMUEL D. HARRIS.

An assignment of goods at sea and their proceeds, is sufficient to pass a legal title to the proceeds.

The United States have a lien on goods imported, for only the duties on the specific goods, and not for other debts due from the importer.

TRESPASS for taking and carrying away twenty boxes of sugar. Plea the general issue.

To prove his property, the plaintiff produced in evidence an instrument purporting to be an assignment to him, by John Fairfield and Samuel M. Holland, of certain merchandise specified in an invoice and bill of lading annexed to such instrument, and the proceeds thereof, the merchandise being then an adventure to Matanzas shipped by Fairfield and Holland. The sugars in question were the proceeds of that adventure. The instrument was signed, "John Fairfield by John Fairfield," with a seal. When the vessel, on board of which the sugar was laded, arrived at Boston, Fairfield went on board with the plaintiff and delivered the sugar, having

[1] See Collyer on Partn. 390.

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indorsed to the plaintiff a bill of lading thereof, which the plaintiff had with him at the time. The invoice of the sugar was indorsed to the plaintiff, and he entered the sugar at the customhouse on the 24th of March, 1827, the day of the delivery above mentioned, and gave bonds for the duties. On the 10th of April following, the defendant, as marshal of the United States, seized the sugar on an execution in favor of the United States against Fairfield, Holland and one Otis, and sold the same and applied the proceeds in part satisfaction of the execution. It was also proved that Holland was a secret partner of Fairfield and equally interested in the sugar, and that the business was carried on in the name of Fairfield alone. 361

The defendant contended that the action of trespass could not be maintained; that the instrument of assignment did not pass the property, inasmuch as it was intended to be a transfer of the outward-bound adventure, and the sugar, although the proceeds of the same adventure, could not pass; that the instrument being signed by Fairfield alone, could not pass the joint property of Fairfield and Holland; and that the United States had a lien on the sugar, Fairfield and Holland being indebted to them on bonds. The bonds did not become due until after the assignment was executed.

All these objections were overruled, and a verdict taken for the plaintiff; whereupon the defendant moved for a new trial for misdirection on the above points.

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Blair, for the defendant, now argued that the assignment was invalid on account of the mode of its execution, one partner having no right to bind another by deed; *Fowler* v. *Shearer*, 7 Mass. R. 14; *Harrison* v. *Jackson*, 7 T. R. 207; *Banorgee* v. *Hovey*, 5 Mass. R. 11; Laws U. S. 1818, *c.* 74, § 23; that at most it passed only Fairfield's moiety; *Cutter* v. *Whittemore*, 10 Mass. R. 442; *Adams* v. *Bean*, 12 Mass. R. 137; that if only a moiety passed, trespass would not lie; *Brown* v. *Hedges*, 1 Salk. 209; *Bond* v *Ward*, 7 Mass. R. 123; and that the United States had a lien. U. S. Laws, 1799, *c.* 128, § 62.

Bassett, *contrà*, cited as to the validity of the assignment, *Halsey* v. *Fairbanks*, 4 Mason, 206; *Gardner* v. *Howland*,

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Hodges v. Harris.

June 26th

2 Pick. 599. [See also *D'Wolf*, v. *Harris*, 4 Mason, 515; *Howland* v. *Harris*, ibid. 497.]

PARKER C. J. delivered the opinion of the Court. There can be no doubt in this case that the verdict is right.

362 The assignment by one partner to pay a *bonâ fide* partnership debt is good,[1] and the indorsement of the bill of lading by Fairfield, with a claim of possession by the plaintiff immediately on the arrival of the sugars, passed the property, even if the preceding assignment was insufficient.[2] But it is very clear that the transfer of an invoice of an outward cargo, after the sailing of the vessel, operates upon the proceeds so as to make them the property of the purchaser. We think it cannot be pretended that the United States have a lien upon all the property of their debtors, to secure bonds which they may owe to the customhouse. They have hitherto claimed no lien beyond the very goods out of which the debt grew, and to extend it as claimed in the present instance, would put an end to all faith and confidence among merchants, and effectually destroy trade.[3]

The seizure on execution by the marshal was undoubtedly a trespass; for having no authority to take the property of the plaintiff by his execution, he must be considered like every other stranger who meddles with the property of another.

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[1] See Angell on Assignments, 49 to 56; Collyer on Partn. 217, and note 69; 3 Kent's Comm. (3d ed.) 44, note *a*; *Haven* v. *Hussey*, 5 Paige, 30; *Pierpont* v. *Graham*, 4 Wash. C. C. 232, 234.

[2] See 2 Kent's Comm. (3d ed.) 548 to 550; 3 Kent's Comm (3d ed.) 207. Abbott on Shipping (4th Am. ed.) 389 and note 1.

[3] The lien of the United States for duties is restricted to the specific articles on which the duties have accrued. *Dennie* v. *Harris*, 9 Pick. 364; *Harris* v. *Dennie*, 3 Peters, 292; *Dennie* v. *Harris*, 5 Pick. 123.

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HENRY BASS, Executor &c. of Henry Bass, *versus* WILLIAM BASS.

The statute of limitations cannot be pleaded in bar to an action upon an open account "concerning the trade of merchandise, between merchant and merchant," although none of the items come within the six years.

ASSUMPSIT. The counts were *quantum valebant* for goods sold, and *indebitatus assumpsit* for money laid out and expended, money lent, and money had and received. In each count was alleged a promise by the defendant to the testator on the 31st of December, 1804. A bill of particulars was filed by the plaintiff in the form of an account current, embracing charges from April 11, 1800, to November 26, 1804, and credits from July 2, 1802, to December 31, 1804.

The defendant pleaded *non assumpsit infra sex annos*. The 363
plaintiff replied, that at the time, &c. the testator and the defendant were merchants, the defendant residing in Bordeaux, in France, and the testator in Boston, and that the causes of action arose out of the mutual dealings and accounts of the defendant and the testator as merchants, and wholly concerned the trade of merchandise carried on between them. To this there was a demurrer.

It was agreed, that on oyer of the letters testamentary, it would appear that the testator's will was proved June 21, 1813, and that the same use might be made of this fact as if it had appeared on oyer.

Shaw and *Bartlett*, in support of the demurrer. 1. Mer- *April 2d.*
chants' accounts are within the statute of limitations, where there have been no dealings between the parties within six years. *Barber* v. *Barber*, 18 Ves. 286 ; *Martin* v. *Heathcote*, 2 Eden, 169 ; *Demarest* v. *Wynkoop*, 3 Johns. Ch. R. 136 ; *Coster* v. *Murray*, 5 Johns. Ch. R. 522 ; *Cogswell* v. *Dolliver*, 2 Mass. R. 217 ; 1 Hovenden's Suppl. to Ves. jun. 628. [*Union Bank* v. *Knapp*, 3 Pick. 112.]

2. The death of the testator must be considered as in effect stating his account. A statement of an account may be presumed. *Topham* v. *Braddick*, 1 Taunt. 572 ; 2 Saund. 127, note 6.

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Bass v. Bass.

Sullivan, for the plaintiff, relied on *Mandeville* v. *Wilson*, 5 Cranch, 15. He cited also 2 Saund. 127, note 6; *Ramchander* v. *Hammond*, 2 Johns R. 200. [*Davis* v. *Smith*, 4 Greenl. 339.]

June 26th. *Per Curiam.* We have examined many cases and find great diversity of opinion in regard to the question before us. In several it has been held, that where there has been a cessation of mutual dealings between the parties for six years, the statute is a bar; but that a charge within that period draws after it others of longer standing. In a case in New York (5 Johns. Ch. R. 522,) Chancellor *Kent* reviews the authorities, and comes to the conclusion, that merchants' accounts are within the statute, where there is no item within six years. In 5 Cranch, 15, the court maintain the contrary doctrine. As
364 the language of the statute is clear, we shall ground our decision upon it. The words are, "all actions of account, and upon the case, *other than* such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants," shall be commenced within the time limited. Such accounts then are not at all within the statute. This is the most natural construction, and indeed the only one which the words will allow. [1]

Plea adjudged bad.

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[1] See *Union Bank* v. *Knapp*, 3 Pick. (2nd ed.) 113, note 1; *Blair* v. *Drew*, 6 N. Hampsh. R. 235. It is now enacted by the Revised Statutes, that in all actions of debt or assumpsit brought to recover the balance due upon a mutual or open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account. *c.* 120, § 5.

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BENJAMIN GUILD, Administrator, *versus* JAMES RICHARDSON, Administrator of Ruggles Whiting.

The defendant in an original writ being named as of a town not within this Commonwealth, and the officer having returned that he had attached all the defendant's interest in a parcel of land, and had left a summons at the place of his last and usual abode when in the Commonwealth, the defendant, after oyer of the writ, declaration and return, pleaded by attorney that he had no interest in the land, and prayed that the writ might abate and for his costs: — *Held* that this was a plea in abatement, and not to the jurisdiction; that it was well pleaded by attorney; that the oyer was unnecessary, as the Court will take notice of facts appearing on the record; that the defendant was not estopped to deny that he had any interest in the land, as it was not affirmed in the return unless by inference; that the plea was valid; that the administrator of the defendant might come in to pursue the plea; and that he was entitled to recover costs.

ASSUMPSIT. The action was brought against Whiting, and after his death, Richardson, as administrator, was allowed to come in and defend. Whiting was named in the writ, as of Louisville in the State of Kentucky. The officer returned, that he had attached all the right and title of Whiting in a parcel of land, and had left a summons at the place of his last and usual abode when in the Commonwealth. Whiting, after oyer of the writ, declaration and officer's return, pleads by his attorney, that, "he had no right, title, interest and property in said land, that could be attached by virtue of said writ, and this he is ready to verify; wherefore he prays judgment of the same writ and that it may abate, and for his costs." To this plea the plaintiff demurs generally.

Rand, in support of the demurrer. The plea is either to the writ, or to the jurisdiction of the court. In either case it must be certain to every intent in particular. Archb. Dig. Plead. and cases there cited; *Roberts* v. *Moon*, 5 T. R. 488. As a plea to the writ it is bad, because it does not give a better writ. *Tingley* v. *Bateman*, 10 Mass. R. 343. In *Evans* v. *Stevens*, 4 T. R. 227, *Buller* J. said, "the plea was bad, because it did not give the plaintiff a better writ, but tended to show he could maintain no action." See also *Mainwaring* v. *Newman*, 2 Bos. & Pul. 125; *Owen* v. *Bulkley*, Comb. 493; *S. C.* 1 Ld. Raym. 345; *Lawrence* v. *Smith*, 5 Mass R. 362; *Rea* v. *Hayden*, 3 Mass. R. 24; *The King*

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v. *Johnson*, 6 East, 598. The matter should have been pleaded in bar, with a prayer "whether the court would compel the defendant to give any further answer." *Symonds* v. *Parmenter*, 2 Str. 1269. See also 2 Saund. 209 *b*, note; *Latch*, 178. And the court cannot give judgment even upon the whole matter of the plea, but only according to the prayer. In *Attwood* v. *Davis*, 1 Barn. & Ald. 178, *Bayley* J. says, "there is a distinction between a plea in bar and a plea in abatement; in the former, the party may have a right judgment upon a wrong prayer, but not in the latter." And every exception to a bad plea in abatement may be as well taken on a general as a special demurrer. Tidd's Pract. (8th ed.) 690, 752; 1 Chit. Pl. (4th ed.) 404.

This is a bad plea to the writ, even if the court are to give judgment upon the whole matter put upon the record by it. But the matters set forth under the oyer are no part of the plea, for the defendant cannot have oyer of a record. *The King* v. *Amery*, 1 T. R. 149; Tidd's Pr. (8th ed.) 636. This may be struck out by the plaintiff and is a nullity. The only allegation in the plea is, that the defendant had no interest in the property attached, that was liable to attachment. The defendant does not allege that he had no property in the Commonwealth, nor that no service was made on his tenant, agent or attorney; nor that he was at no time an inhabitant or resident in the Commonwealth; nor that he had no last and usual place of abode here. If he has a usual place of abode here,

366 it is enough if the officer leaves a summons there, when the defendant happens to be absent, whether he is in the Commonwealth or not. *St.* 1797, *c.* 50, § 5. This does not differ from the case where the officer returns that he has attached a chip and left a summons at the last and usual place of abode of the defendant. Would it be a good defence in that case, to say he had no interest in the chip, that could be attached? Surely not; nor is it in this case. It does not follow, because he was of Louisville in Kentucky, that his permanent residence was there, nor that he had no place of abode in Boston, nor that he was in Kentucky when the writ was served. If he was born there, or had, until a recent period before the service of the writ, lived there, or was there for a temporary pur

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pose, the allegation in the writ would be satisfied. *St.* 1797, *c.* 50, § 5.

But it is not necessary to look into the record. The plea is to be supported by the facts alleged; and the only fact alleged is, that the defendant had no interest in the property attached. Nothing else is put in issue, and this issue is wholly immaterial; for he may have other property here, and the regularity of the service in other respects is not questioned by the plea.

This exception, if available at any time, comes in this instance too late. The defendant appeared by attorney and put in his plea by attorney, not especially authorized, but who is an officer of the court; and thereby waived all exception to the service of the process. *Knox* v. *Summers*, 3 Cranch, 496.

This is in substance a plea to the jurisdiction, and the case of *Lawrence* v. *Smith*, 5 Mass. R. 362, where a similar plea was overruled because it did not give a better writ, is directly in point. See also *Tingley* v. *Bateman*, 10 Mass. R. 343; *Rea* v. *Hayden*, 3 Mass. R. 24; *The King* v. *Johnson*, 6 East, 598. If no court had jurisdiction, it should have been pleaded in bar.

Being a plea to the jurisdiction substantially, it should not have concluded to the writ, and it is bad for that cause. 1 Chit. Pl. (4th ed.) 386; *Bowyer* v. *Cooke*, 5 Mod. 146; Bac. Abr. *Pleas, &c. E* 2; *Lampley* v. *Thomas*, 1 Wils. 193; 2 Str. 1269. By concluding to the writ the jurisdiction of the court is admitted, or any exception to it waived. Tidd's Pr. (8th ed.) 680; Gilb. Com. Pl. 187; 1 Chit. Pl. (4th ed.) 380; Co. Lit. 303. The Court have jurisdiction over the subject matter, this being the *forum contractûs*, as appears by the record, and in such case they will, on the slightest admission of their authority, exercise jurisdiction over the person; Cod. 8. 36. 13. In the French courts and Dutch courts the same rule prevails. Domat, Supplem. to Pub. Law, *lk.* 4, *tit.* 2, § 11; Van Leeuwen, (*Eng. Transl.*) 551. 367

If the plea is bad, the defendant must answer over, for there is nothing on the record to show that the court have no jurisdiction: but if there were, and the court should on that ac-

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count order proceedings to be stayed, no costs ought to be allowed. 5 Mass. R. 362; 10 Mass. R. 343. See also *Clark* v. *Rockwell*, 15 Mass. R. 221; *Thomas* v. *White*, 12 Mass. R. 370. In overruling a demurrer to a plea in abaten ent in England, no costs are allowed under 8 and 9 *Will* 3, *c.* 11, § 2. 1 Lee's Dict. Pract. 401. The reason al leged is, because the plaintiff could not have had costs if judgment had been given for him. *Thomas* v. *Lloyd*, 1 Salk. 194 *Garland* v. *Exton*, 2 Ld. Raym. 992; *Thrale* v. *Bp. of London*, 1 H. Bl. 532. There is no reason why the same rule should not be adopted in this Commonwealth. Neither party prevails on the merits. No costs are allowed on arrest of judgment. *Brown* v. *Austin*, 1 Mass. R. 208, 219; nor where the writ abates by the death of a party; *Cutts* v. *Haskins*, 11 Mass. R. 56; nor where the defendant, after suit, is summoned as trustee. *Foster* v. *Jones*, 15 Mass. R. 185. It is enough to say in this case, that if the writ must abate, it is not by reason of any thing contained in the defendant's plea; and he therefore ought not to have costs; 10 Mass. R. 343; 5 Mass. R. 362; 15 Mass. R. 221; [Rand's ed. 221, note *a*;] 12 Mass. R. 370.

All that has been said applies to the original defendant. But if the court could not have taken jurisdiction of the case in the first instance, yet since the administrator of the original defendant has come in voluntarily, and requested the court to
368 admit him to defend, the court can now require him to plead to the merits. The note on which the suit was brought was made here; according to the return of the officer on the writ, the defendant had a last and usual place of abode here; he died here; he left property here, and original administration on his estate has been granted here. Surely this is enough to give the court jurisdiction, when the defendant voluntarily comes in. Can he come in to take upon himself the defence of the suit, merely to show cause why he should not take upon himself the defence?

Shaw and *Bartlett*, for the defendant, cited, as to the plea, *Blake* v. *Jones*, 7 Mass. R. 29; *Gardner* v. *Barker*, 12 Mass. R. 36; *Eaton* v. *Whiting*, 3 Pick. 484; — and as to costs, *Thomas* v. *White*, 12 Mass. R. 367.

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Guild v. Richardson June 26th.

WILDE J. delivered the opinion of the Court. As the plea in this case is a plea to the writ, and not to the jurisdiction of the court, the principal part of the argument of the plaintiff's counsel is inapplicable. Whether a plea is a plea in abatement, or in bar, or whether it is to the writ, or to the jurisdiction of the court, must be determined by the form of the plea, particularly by the conclusion or prayer of it; and not by the subject matter of the plea. And if it be true, as the plaintiff's counsel contends it is, that the substance of the plea is not sufficient to abate the writ, but that it ought to have been pleaded to the jurisdiction of the court, we hold it to be very clear that the plaintiff is entitled to a judgment of a *respondeas ouster*. But we hold it equally clear that the position taken by the plaintiff's counsel cannot be maintained. The plea would not be good, as a plea to the jurisdiction; such a plea should aver, not only that the property attached was not the property of the defendant; but that he had no other property within the jurisdiction of the court. It is clear, therefore, that if the plea will avail the defendant at all, it is properly pleaded. For it is not necessary to aver any fact already appearing on the record, for without oyer the court will take notice of the facts appearing on the record. It was not therefore necessary to aver that the defendant was not an inhabitant of the Commonwealth, if that fact were material. We do not however see how that fact can be material. The object of the plea is to show, by 369
proper averments, that there had been no sufficient service of the writ. It avers that the property attached was not the property of the defendant, and if this is well pleaded, it is admitted by the demurrer. And we are of opinion that this is a material fact and well pleaded; if the fact had appeared by the return of the officer, it is very clear that the writ might have been abated on motion. If the officer had returned that he had attached the property in question as the property of A. B., a stranger, the service would clearly be insufficient. But it is said that this cannot be pleaded; that it is like the case of a formal attachment of a chip, in which case it is said the return cannot be traversed; and this may be admitted, although it is not necessary to give an opinion on this point. If the return cannot be traversed, it is because the defendant

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is estopped to deny the truth of the return; but in this case there is no such estoppel, for the return does not show that the property was the property of the defendant. The officer returns that he attached all the right and title of the defendant to the property in question, but it is not averred that the defendant had any right and title, and a party is not to be estopped by implication. An estoppel must be certain to every intent. Therefore, if a thing is not expressly and precisely alleged, it will be no estoppel. Co. Lit. 302; Archb. Dig. 199. To estop the defendant, the officer should have returned expressly, that the property attached was the property of the defendant. The doctrine of estoppels is to be received in great strictness, and no fact is to be taken by inference.

But it has been argued, that the plea is bad because it does not give the plaintiff a better writ. This case however does not fall within this rule of law: indeed, the exceptions to the rule are so numerous, that it can hardly be called a general rule of law. But whatever may be its application to facts, it is never necessary to give the plaintiff a better writ by averring any matter of law. Thus the court will abate the writ *ex officio*, or on motion, where any defect appears on the face of it, or for an insufficient service; as for variance between the
370 writ and the count, false Latin, repugnancy, uncertainty, and the like; and by our practice, the defendant may plead any of these defects without obtaining oyer of the writ. The practice as to oyer is different in England, but in no such cases is the defendant required, either in England or here, to give the plaintiff a better writ. So in England the writ will abate if there are not fifteen days between the teste and the return, but it is not necessary to aver that the law requires fifteen days to intervene; and so is the law here, if the writ is not served fourteen days before the return day. So the defendant may plead there is no such bill as that alleged in the writ. Com. Dig. *Abatement*, *H.* 18. So if several defendants are named in the writ, one may plead that there are no such persons in existence as the others, who are named co-defendants. So the defendant may plead there is no such person as the plaintiff *in rerum naturâ*. So in the case of *Brewer* v. *New Gloucester*, 14 Mass. R. 216, the defendant pleaded that

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the writ was served by the sheriff, and that one of his deputies was an inhabitant of the defendant town; but it was not held necessary to aver that the service should have been made by a coroner. So *non-tenure* may be pleaded in abatement, without showing who is tenant. The rule in question therefore is of limited application, and is binding only in cases where misnomer is pleaded, or the defect relied on depends on some fact presumed to be within the peculiar knowledge of the defendant. And in all cases, if the plea go to the matter and substance of the writ, it need not give a better writ. Archb. Dig. 304. It is on this ground that *non-tenure* as to the whole is good, without showing who is tenant, because it avoids the whole action. So in a writ of entry alleging that the tenant had no entry but by A, to whom B released, &c. the defendant may plead that B did not release to A, without saying to whom the release was made. And the same applies to a defective service which defeats the action.

The case of *Lawrence* v. *Smith*, 5 Mass. R. 362, cited by the plaintiff's counsel, was decided on the ground of want of jurisdiction and therefore is not in point. And the case of *Tingley* v. *Bateman & Tr.*, 10 Mass. R. 343, was decided on the same ground, though I own it seems to me it might 371
have been decided on principles more favorable to the defendant. But that case is distinguishable from the present, as the service of the writ was defective on the face of the return, and the court might abate the writ or stay proceedings without plea; but in the present case, the return of the sheriff is apparently good, and would authorize the court to render judgment on default or plea to the action. The defendant therefore could not have taken advantage of the defect in the service out by plea, and a plea in abatement was a proper plea.

And this plea was well pleaded by attorney. If it had been a plea to the jurisdiction, the reasoning of the plaintiff's counsel would have been conclusive. So, according to the English practice, misnomer cannot be pleaded by attorney; but other pleas in abatement may be so pleaded and such is the uniform practice. By appearing by an attorney of the court, the defendant admits its jurisdiction, but not that the writ is good, or the service sufficient. We are therefore of opin-

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Guild v. Richardson.

ion that the plea in abatement is good, and that the defendant, as the prevailing party, is entitled to costs. The administrator has the same right to take advantage of any defect in the process as the intestate had, and thereby to defeat a recovery against the estate.

It has been argued that the administrator, coming in voluntarily, admits the jurisdiction of the court; but this case, as has been shown, does not depend on a question of jurisdiction, and therefore the argument founded on this position fails. I has been said also, that the administrator cannot come in merely to maintain the plea; but we see no reason why he may not maintain a plea in abatement, seasonably pleaded, as well as a plea in bar. A plea in abatement may be decisive of the action; as the plead of *non-tenure;* but if it is not, it may involve a question of costs of considerable amount, from which the administrator may be bound to relieve the estate of the intestate, and he has the same legal rights and duties whether he comes in voluntarily, or upon summons. He comes in as the representative of the original defendant, and has all his legal rights, and may well therefore follow up the plea by him pleaded. And that plea being good and sufficient to abate the plaintiff's writ, it conclusively follows that the defendant, as the prevailing party, is entitled to judgment for his costs

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CALVIN BAILEY *versus* GEORGE CLARK.

Where C furnished money to D to be employed in trade, either by D alone or in partnership with a third person, the net profits to be equally divided between C and D, and D entered into partnership with B, it was *held* that as between C and D this was only a loan, though as to creditors dealing with D they would have been considered as partners; but that B, who, before he entered into partnership, knew the nature of the transaction between C and D, was not entitled to claim against C as a partner of D.

B, as surviving partner of D, erroneously supposing the firm to be solvent and indebted to D, paid money to C on account of his claim against D, and thereupon took a receipt for the same of D's administratrix, and she took one of C. *Held* that B's remedy to recover back the money, as paid by mistake, was against the administratrix, and not against C.

THIS was an action of assumpsit on the common money counts to recover the sum of 2500 dollars.

At the trial it was proved, that on the 11th of June, 1817, Clark made an agreement under seal with Charles A. Dennet, in which he covenants to pay to Dennet the sum of 4000 dollars, and to let him have the use of it for three years, and Dennet covenants to employ it in trade, either by himself, or in partnership with such other person as he may select; and they mutually agree to receive each a moiety of the net profits, Dennet's share to be in full satisfaction for his trouble and services.

On the 25th of the same June, Dennet entered into a general copartnership with Bailey, for three years, and each paid in as capital stock, the sum of 4888 dollars. Bailey then knew of the agreement between Clark and Dennet.

On the 12th of December, 1819, Dennet died, and Bailey proceeded to settle the concerns of the partnership. On the 20th of January, 1821, 2500 dollars were paid to Clark by Bailey, and thereupon Clark gave a receipt, stating that he had received that sum of the administratrix of Dennet, on account of the deceased; and the administratrix at the same time gave 373
a receipt, stating that she had received that sum of Bailey, surviving partner of the firm of Bailey and Dennet, on account of the deceased. There was evidence in the case tending to show that this payment was made by Bailey under the belief that such an amount would be coming from the firm to Den-

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Bailey v. Clark.

net; which belief proved to be erroneous. It was testified that Bailey said all the debts of the firm were paid, and that the firm owed him for money advanced for that purpose.

The plaintiff contended, 1. that if Clark, by virtue of the agreement of June 11th, was a partner of Bailey & Dennet, he was liable to refund the sum of 2500 dollars paid to him by Bailey under the belief that the firm was solvent at the time of Dennet's decease, and that such an amount or more would be coming to Dennet upon the final settlement of the copartnership concerns; and that this was the proper form of action for the recovery thereof: — Or, 2. that if Clark was not a partner of Bailey and Dennet, then he was liable to refund the sum in question paid to him by Bailey on account of money said to be due to him from Dennet's estate, under the belief that the firm of Bailey & Dennet was solvent at the time of Dennet's decease and at the time of such payment, and that such an amount or more would be coming to the estate of Dennet upon the final settlement of the copartnership concerns; and that this is the proper form of action for the recovery thereof.

The defendant insisted, that as it regards Bailey & Dennet, he was not a copartner, and not bound to refund this money or any part of it, and not involved in their concerns in any other manner than as his interest might be further affected by the insolvency of Dennet; and that if he was a copartner, this action could not be maintained against him.

If the Court should be of opinion that the defendant was thus chargeable, and that the action could be sustained, the case was to be sent to auditors.

June 20th.

S. D. Parker and *Mason*, for the plaintiff. In regard to third persons, and likewise as between themselves, Clark and

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Dennet were partners, by virtue of the agreement of the 11th of June. Montag. on Partn. 2, 6, *in notis*; Carey on Partn. 77; *Peacock* v. *Peacock*, 2 Campb. 45; and Clark in fact, though perhaps without any such intention, became a partner of Bailey and Dennet. But if Bailey was not a copartner of Clark and Dennet, then he stands toward them in the situation of creditors dealing with Dennet, in regard to whom they must be considered as partners.

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Supposing the three to have been partners, this action of assumpsit will lie. All the debts due *from* the firm have been paid. See *Fanning* v. *Chadwick*, 3 Pick. 420, and authorities there cited; *Brinley* v. *Kupfer*, *ante*, *p.* 179.

If there was no partnership between Clark and Dennet, yet as Bailey has paid the money to Clark by mistake, the Court will not require two actions to be brought, one by Bailey against Dennet's administratrix and another by her against Clark, but, to avoid circuity, will permit Bailey to recover in the present action.

S. Hubbard and *W. J. Hubbard*, *contrà*, contended that there was no partnership between Clark and Dennet, but only a loan of money; Gow on Partn. 9; *Gill* v. *Kuhn*, 6 Serg. & Rawle, 333; *Lowry* v. *Brooks*, 2 M'Cord, 421; *Hesketh* v. *Blanchard*, 4 East, 144; and if so, and if the money was paid by mistake, that the action should have been against the administratrix of Dennet's estate; and that if Clark was a partner of Bailey and Dennet, assumpsit would not lie before a final settlement of the partnership concerns. *Holmes* v. *Higgins*, 1 Barn. & Cressw. 74; *Bovill* v. *Hammond*, 6 Barn. & Cressw. 149.

June 26th.

Per Curiam. Whether the plaintiff has a right to recover, depends on the question whether Clark was a partner of Dennet. Clark was a lender of money to assist Dennet, and instead of interest he was to receive half the net profits. This is the meaning of the instrument, though as to creditors dealing with Dennet there would be a partnership. Bailey knew the state of things between Clark and Dennet, and that the transaction was merely a loan; so he cannot be considered as a creditor of Clark and Dennet.[1] There was a debt due from Dennet to Clark, and Bailey paid it, probably from the funds of Bailey and Dennet; and in such case he will have a claim against Dennet's estate, if it shall appear that a balance is due from Dennet to the firm.

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Plaintiff nonsuit.

[1] See Collyer on Partn. 56, n. (9); 214, and n. (64.)

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Washington Bank *versus* Boston Glass Manufactory.

The deputy sheriff who served the original writ in this case, returned that he had attached various parcels of land, supposed to belong to different persons alleged to be members of the Boston Glass Manufactory, and so, under *St.* 1808, *c.* 65, liable for corporate debts, and he taxed as his fees, besides the usual charge for copies, fifty cents for each parcel of land so attached. The defendants objected to the taxation of fees for more than one service; and the *Court* ruled, that there was but one defendant, and by *St.* 1795, *c.* 41, [see Revised Stat. *c.* 122, § 5,] the officer was entitled to fees for but one travel and one service; that the attachment of the different parcels of land did not entitle him to a separate fee for each, any more than if it had been of divers chattels, it being in law but one act and to be considered as one service. The clerk was accordingly directed to tax fifty cents for one service, with the usual fees for copies.

Israel Thorndike *versus* William H. Bordman.*

Assumpsit on a policy of insurance. The plaintiff, who was the prevailing party, sent to the Isle of France a commission to take evidence. The depositions of five witnesses were taken under the commission, and triplicate copies were sent to the plaintiff by different vessels. The expenses for executing the commission were 1431 dollars; but the *Court*, in the exercise of their discretion, allowed the plaintiff to tax for them in his bill of costs, only the sum of 400 dollars.

* Reported in 4 Pick. 471

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The Proprietors of CHARLES RIVER BRIDGE, in Equity, *versus* The Proprietors of WARREN BRIDGE *et al.*

Under St. 1827, c. 88, giving relief in equity in cases of waste and nuisance, this Court has equity jurisdiction in regard to nuisances of a private nature; such as establishing without right a bridge so near to one before rightfully existing, as to diminish the profits accruing from tolls; there not being in such case a plain, adequate and complete remedy at law.

Whether in regard to some public nuisances, as where the health or comfort of a neighborhood is affected, the Court has not similar jurisdiction, at least so far as to procure immediate relief by injunction, *quære*.

The several statutes giving equity jurisdiction to this Court are not at variance with the 15th article of the Declaration of Rights, securing a right to a trial by jury in all controversies concerning property (certain cases excepted), for whenever a party shall require that any controverted fact be tried by a jury, the Court by force of that article will order an issue for that purpose.

Upon a bill in equity filed by the proprietors of a toll bridge built many years ago under authority from the legislature, praying for an injunction to restrain the defendants from erecting another bridge so near as to interfere with the plaintiffs' franchise, the Court refused to grant a temporary injunction before a hearing on the merits, on the grounds, — that the defendants likewise professed to act under authority from the legislature, and denied the exclusive right of the plaintiffs to the extent claimed by them, — and that the injury which the plaintiffs might suffer by the delay was not in its nature irreparable.

THIS was a bill praying for an injunction to restrain the defendants from building a bridge which they had begun to erect by virtue of an act of the legislature, and also from suffering passengers to go over the same. The facts alleged in the bill were as follows:—That the plaintiffs were made a corporation by an act passed March 8, 1785, and were authorized to erect a bridge over a navigable river, called Charles River, between Boston and Charlestown, where an ancient ferry was before kept; that the bridge was designed to accommodate all passengers of every description, during the term of forty years, on a certain line of travel leading to and from the southerly part of Charlestown from and to the northerly part of Boston, as delineated on a plan annexed to the bill; that by the same act, and for the purpose of reimbursing the money expended in building and supporting the bridge, the plaintiffs were authorized to take, for their sole benefit, certain tolls of all pas- 377
sengers, as specified in the act; which tolls were to continue

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forty years from the day of opening the bridge for passengers That certain duties and obligations in favor of the public were imposed upon the plaintiffs; as that the bridge should be of certain dimensions and be lighted, as specified in the act, and that the draw should be lifted without any toll, for all vessels passing the same, except in certain cases otherwise provided for. That the proprietors should also pay annually to the President and Fellows of Harvard College, (who were alleged to be the former owners of the ferry,) 666 dollars 67 cents, during said term; at the end of which, the bridge should be left in good repair and revert to the Commonwealth; saving to the college a reasonable annual compensation for the annual income of the ferry which they might have received, had not the bridge been built. That the plaintiffs accepted the act of incorporation according to its terms, and thereby a contract was created between the Commonwealth and themselves conformably to the act. That the President and Fellows of Harvard College, before the passing of the act, had become and were the owners of the ancient ferry, exclusive of the right of any person or corporation to maintain a ferry or other permanent method of transporting by boats or otherwise, for hire or toll, any passengers, cattle or vehicles travelling to and from the southerly part of Charlestown from and to the northerly part of Boston; that no other ferry across the river was ever established or used for the travel of passengers between Boston and the opposite shore of the river; and, that the act of incorporation was passed with the consent of the President and Fellows of Harvard College; by means whereof the plaintiffs became the possessors and grantees of the President and Fellows in the ferry, during the term of forty years, and entitled to the exclusive right of erecting a bridge over the river, for the use of all persons going upon the said line of travel, to the same extent and for the same purpose to which the right of the ancient ferry extended. That the plaintiffs, pursuant to their
378 act of incorporation, built the bridge, and opened the same for passengers on the 17th of June, 1786, and have ever since kept the same in good repair, and in all other respects have performed the duties which by the act were to be performed by them, and that the use of the ancient ferry, as the same was

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before used, has been discontinued. That by another statute of this Commonwealth, of March 9, 1792, for incorporating certain persons to build West Boston bridge, so called, leading from West Boston to Cambridge, (which statute was passed with the consent of the President and Fellows of Harvard College,) it was, among other things, recited, that the bridge of the plaintiffs was a work of hazard and public utility, and that another bridge in the place then proposed for the West Boston bridge (which place was higher up the river, and distant from the plaintiffs' bridge about one mile, measuring on the Boston side of the river, and about two miles measuring on the opposite shore) might diminish the emoluments of the plaintiffs' bridge; therefore, for the encouragement of enterprise, it was, among other things, enacted, that the plaintiffs should continue a corporation as aforesaid for the further term of thirty years, in addition to their original term, making in the whole the term of seventy years, which will expire on the 17th of June, 1856, at which period their bridge should revert to and be surrendered in good repair to the Commonwealth; in consideration of which additional grant the plaintiffs should also relinquish the additional toll originally authorized to be taken by them on the Lord's day. That the plaintiffs did accordingly accept the terms offered them in the last mentioned act; by reason whereof they became entitled to the right of keeping their bridge for the additional term of thirty years, *to wit*, commencing the 17th of June, 1826, exclusive of the right of any other person or corporation to erect any bridge for accommodating the same travel as above stated. That the last mentioned act went into operation, and immediately thereupon the plaintiffs relinquished the additional toll on the Lord's day and have ever since forborne taking it; and have in all other respects complied with the terms of the two acts above mentioned. By reason of all which the plaintiffs are entitled to 379
have, during the residue of the term of seventy years, the exclusive right of erecting and maintaining their bridge, &c. The plaintiffs also alleged, that the said corporation called "The Proprietors of the Warren Bridge" (under whose pretended authority the individuals named in this bill as combining with them will in any suit at law attempt to justify

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themselves) have no real or personal property or other funds to respond any damages which the plaintiffs might recover at law for any injury sustained by the erection of the Warren bridge, unless it be from assessments upon the respective proprietors, which assessments are restricted to the mere expenses attending the building of the same.

The bill then proceeds to aver, that the corporation called "The Proprietors of the Warren Bridge," created by an act of the legislature passed on the 12th of March, 1828, together with certain other persons, *to wit*, John Skinner (and others named in the bill) and divers other persons to the plaintiffs unknown, combining and confederating together, deny and disregard the exclusive right of the plaintiffs, and openly threaten to erect another bridge over the same navigable river, for the passage of foot passengers and all others, with their cattle and carriages, upon and along the line of travel aforesaid, without payment to the plaintiffs of the tolls granted to them as aforesaid, and have, as the plaintiffs are informed and believe, commenced the building of the bridge, beginning the same at the distance of two hundred and sixty feet from the bridge of the plaintiffs on the Charlestown side of the river and eight hundred and fifty-two feet from the end of the plaintiffs' bridge on the Boston side thereof, and communicating by a highway laid out or intended to be laid out by the defendants from the Charlestown end of the Warren bridge to Charlestown Square, with which square both of the bridges will communicate, at the distance of about 390 feet from the respective terminations of the bridges on the Charlestown side. That all the travel of every kind, direct from Charlestown to Boston, which shall pass over the Warren bridge, must, as the highways now are and ever have been established, pass through
380 or from Charlestown Square, and must necessarily, if the Warren bridge were not erected, pass, as it always has heretofore, over the bridge of the plaintiffs, paying the tolls established as aforesaid; and that the only direct avenue from the Boston terminus of the Warren bridge to the business part of Boston is laid out over land newly made, upon which there is neither any dwellinghouse or warehouse, store or other building for business, until this avenue meets one of the great or

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common avenues along which the travel over the plaintiffs' bridge has been accustomed to pass. That the bridge is about to be erected by the Warren Bridge Corporation and John Skinner and others, with the open and avowed purpose and intent of diverting the travel from the bridge of the plaintiffs as aforesaid; which will operate to their irreparable loss, detriment and injury, and in derogation of their lawfully vested exclusive rights as aforesaid, and so far as their said rights are concerned will be a nuisance.

The bill then further avers, that the Proprietors of the Warren Bridge and J. Skinner and others pretend, that they are duly authorized to build a bridge as aforesaid by virtue of a certain act, purporting to be a statute of the Commonwealth, passed on the 12th day of March, 1828, entitled "An act to establish the Warren Bridge Corporation," a copy of which is annexed, and which the plaintiffs pray may be taken as a part of their bill of complaint. Whereas the plaintiffs expressly charge, that the alleged statute, as it purports to grant a right to said corporation incompatible with and repugnant to the vested rights of the plaintiffs, did in so far, and in that respect does impair the obligation of the contract aforesaid between the Commonwealth and the plaintiffs by which the said exclusive right was granted to the plaintiffs; and so being contrary to the constitution of the United States is utterly void, invalid, and of no effect, and the authority supposed to be derived therefrom is wholly void and ineffectual. That the said Proprietors and said J. Skinner and others do at other times give out and suggest, that on account of the increase of travel, the public necessity or convenience did require that another bridge should be erected, and therefore, notwithstanding 381
the right of the plaintiffs, the legislature at their discretion and for the public accommodation, had a right and were well warranted in passing the act aforesaid, and the authority derived from it to build said other bridge is a good and sufficient authority for that purpose; whereas the plaintiffs expressly charge, that the constitution of this Commonwealth and the bill of rights thereof do so far restrain legislative power, that it cannot revoke or annul its own grant, or transfer or divest a legal vested right in individuals, excepting only in those cases

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where the property of individuals is taken or appropriated for the public use; and that in such last case such property can only be taken or appropriated by some act which provides a just compensation therefor to the individuals from whom it is so taken; and further, that if the public necessity or convenience had required the erection of another bridge at the place aforesaid (which they wholly deny), such other bridge being to the detriment, diminution and destruction of the aforesaid rights of the plaintiffs, would have been a taking of private property for public uses, within the true meaning and intent of the constitution of the United States, and an appropriation of the property of individuals to public use, within the true meaning and intent of the constitution of this Commonwealth, which could not be constitutionally done by a statute of the Commonwealth, without providing at the same time a reasonable compensation therefor; but neither by the supposed act, nor by any other act or proceeding, did the legislature of the Commonwealth provide for any compensation to the plaintiffs for their property so alleged to be taken and appropriated to the public use; and for this cause also the supposed act is void. And the plaintiffs further allege, that the Proprietors of Warren Bridge and J. Skinner and others do further sometimes give out and pretend, that, although the said Charles River bridge is 42 feet wide, and wider than required by their act of incorporation, yet it is too narrow to accommodate the public travel on said line of travel; at other times, that the raising of the draw for the passage of vessels is an obstruction
382 to the public travel, which might in some measure be relieved by the erection of another bridge nearly parallel thereto; at other times, that the avenue to said bridge on the Charlestown side is too narrow for the travel leading thereto; and at other times, that the proposed bridge would accommodate passengers wishing to go to the westerly part of Boston from Charlestown Square; whereas the plaintiffs, denying that their bridge is too narrow to accommodate the public travel, and that the erection of another bridge as last aforesaid would relieve the delay and inconvenience arising from the raising of the draw, and that the avenue leading to their bridge on the Charlestown side is inconveniently narrow, and that the erection of a new bridge

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in the place proposed would accommodate passengers from Charlestown Square to the westerly part of Boston, other than a very few passengers, and them in a very slight degree, do expressly *charge*, that while the said act was under the consideration of the legislature and before the passing thereof, the plaintiffs did, by memorials addressed to the Senate and House of Representatives of this Commonwealth, assert and make known their rights aforesaid and did protest against the granting of any authority to erect the new bridge; and did further expressly offer, at their own expense, if so authorized by the legislature, to make their own bridge sixty or eighty feet wide, and also, in order to relieve the delay and inconvenience occasioned by raising the draw thereof, did offer to construct at their own expense a circular draw thereto, so that travellers should not be delayed or impeded while vessels were actually passing through their bridge; and also, that they were willing to make the Charlestown avenue to their bridge of any width which the legislature might authorize; and also, if deemed expedient, to construct a spur-bridge, leading from their bridge to a point at or near the spot where the proposed bridge of the defendants was to terminate on the Boston side; by means of which the impediments to navigation as well as other inconveniences would be avoided; — and also, that they would do any other matter or thing, even to the extent of building another bridge, in any way pertaining to the accommodation of the public, &c. And forasmuch as matters of this description are 383
more properly cognizable and relievable in this Court sitting as a court of equity, and in regard that the plaintiffs have no mode of inquiry into, ascertaining and preventing the said nuisance, detriment and injury, threatened and commenced against their said exclusive rights set forth as aforesaid, but by the aid of this Court sitting as a court of equity; now, to the end that the proprietors of the Warren bridge, and the said John Skinner and others may true and perfect answer make in the premises, &c. and that they and their agents and servants may forthwith be absolutely enjoined, restrained and prohibited from building or erecting or commencing or proceeding to build or erect the said bridge at the place aforesaid, &c.

The bill was filed on the 28th of June, 1828, and a sub-

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pœna was prayed for which was granted, and on the same day a motion was made for an immediate injunction to stay the further building and finishing of Warren bridge, until a hearing and final decision upon the bill and such answer as should be made thereto by the parties defendant. On this motion notice to the defendants was ordered, and the 5th of August assigned for a hearing; on which day both parties appeared by their counsel, and were heard on the question, whether the injunction moved for should be granted. Certain affidavits and maps were read and exhibited by the plaintiffs in proof of the facts set forth in the bill.

Aug 5th. *Webster* and *Shaw*, for the plaintiffs. The question raised in the present case is one of delicacy and importance, and deserves the deliberate attention of the Court. Respect is due to the legislature of a State; but it will be admitted by the defendants, that cases do exist where legislatures do wrong and ought to be restrained; if the laws are to be respected, so is the constitution.

The Court has jurisdiction in this case, by virtue of *St.* 1827, *c.* 88, giving relief in equity in cases of waste and nuisance; but by *St.* 1817, *c.* 87, "for giving further remedies in equity," it would have had power to give relief as upon a contract between the Commonwealth and the plaintiffs; a
384 bill will lie not only against the original parties to a contract, but also against those who have a derivative authority under them. But if it were doubtful whether the Court could give relief under this latter statute, still the statute of 1827 gives, in terms, the requisite authority. The present is a case of *nuisance*, technically speaking. Com. Dig. *Action on the Case for a Nuisance, A*; *Steele* v. *Western Inland Lock Navigation Company*, 2 Johns. R. 283; *Inhabitants of Arundel* v. *M'Culloch*, 10 Mass. R. 70; *Hughes* v. *Heiser*, 1 Binney, 463; *Croton Turnpike Co.* v. *Ryder*, 1 Johns. Ch. R. 611; *Gardner* v. *Newburgh*, 2 Johns. Ch. R. 164. If it should be said that the present is a case of *public* nuisance, still, if a special injury is sustained by an individual, he has this remedy. *Corning* v. *Lowerre*, 6 Johns. Ch. R. 439. In all cases, where a party has an exclusive right to a ferry, market, &c., the erection of another near it is a nui-

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sance. What, then, are the rights of the plaintiffs? It is not material to consider how near to their bridge the nuisance is erected, if it affects their rights. Now the act of incorporation shows, to a certain degree, the rights of the plaintiffs, and the evidence in the case shows that Harvard College was in possession of the ancient ferry seventy years ago; but this is also a matter of general notoriety, and is recognised in various ancient laws. In 1636, the year when the college was established, there is a recognition of a grant of the income of this ferry to the college; and a recital by a grantor is good evidence of a grant, especially against one who claims no title. Ancient Chart. &c. 78. It was again recognised in 1654; ibid. p. 80; and in 1710; Prov. Laws, *St.* 9 *Anne*, *c.* 1; and again in the act of incorporation; *St.* 1784, *c.* 53. If it should be admitted, for the purpose of the argument, that the grant originally was temporary or only "during the pleasure of the country" or government, still, by this last act that "pleasure" was restricted for forty years at least; and after that term there is a further provision for the rights of the college. Here, then, is a clear case of title; if there might in strictness be any question as to the extent of the right which the college had in the ferry, yet the public understanding was, that it extended at least as far up the river as West Boston bridge; because when that bridge was granted in 1792, provision was 385 made for an additional indemnity to the college; and when Canal bridge* was built, a part of the college annuity was to be paid by the proprietors of that bridge also.

It is not necessary, for the purposes of this case, to define the exact extent of our rights; but we are entitled at least to the exclusive right of transportation between Boston and Charlestown. This is conformable to the adjudication in *Tripp* v. *Frank*, 4 T. R. 667, a case which deserves particular attention; and the same principle is adopted in *Ogden*

* To make the case intelligible to persons not acquainted with the local situation of the bridges over Charles river, it may be proper to state, that Canal bridge is above the Warren bridge and below the West Boston bridge. The main Canal bridge leads from Boston to Cambridge, but near the middle of it is a branch leading to Charlestown, so that persons may pass either between Charlestown and Boston or between Charlestown and Cambridge *Reporter*

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v. *Gibbens*, 4 Johns. Ch. R. 150. On this ground the grant of Canal bridge may be distinguished, as that branch of it which leads to Charlestown was intended to accommodate the travel between Charlestown and Cambridge and not between Charlestown and Boston; and that branch was too remote from the principal line of the public travel, to do very great injury to the bridge of the plaintiffs.

Ferries, at common law and in equity, are considered as *property*; they are necessary to the public accommodation, the owners are compelled to transport passengers at all times; and to secure this accommodation, a valuable interest is granted to the owners. 2 Dane's Abr. 681, 682; *Tripp* v. *Frank*, 4 T. R. 666. A ferry near to another, must, in order to be lawful, accommodate a different line of travel; otherwise it will be a nuisance in law. 3 Black. Com. 218; *Ogden* v. *Gibbens*, 4 Johns. Ch. R. 150, and particularly 159; *Yard* v. *Ford*, 2 Saund. 172, Williams's note. The place of this ferry is laid down in a map taken by the British officers, so long ago as the year 1775. The law in these cases is well settled; but in the reported cases it is sometimes a question of fact, how far one ferry is a disturbance of another. In the case of fairs, if one is held on the same
386 day and at the same place with another, the law will intend it to be a nuisance; but if on a different day, a question may be made. Fitzh. N. B. 184, note, as cited in 2 Saund. 175, note 2. The intent of the legislature in the present case was, to grant the right of travel on this line. *Act of Incorp.* 1784, c. 53. By *sect.* 3, a toll is granted to reimburse the money expended by the proprietors. Here are all the ingredients of a contract, made by the public, the plaintiffs and the college. In 1792 West Boston bridge was granted; and then it might have been made a question whether there was any interference of the two grants; but it was left to the decision of the legislature. Here was, therefore, a grant of a franchise as a substitute for the ancient ferry, and there was a contract for a certain extent of travel. Then the question arises, whether the act authorizing the new bridge was constitutional; if not, it is so far inoperative.

There are two grounds of objection to it, — 1. it impairs

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the obligation of contracts; and 2. no compensation is given to the plaintiffs for property taken from them and appropriated to public uses. That a grant made by the legislature of a State is a contract, has been judicially settled; both parties are therefore bound by it; like other contracts, it is, by the legal rule, to be construed most strongly against the grantor; and the intent of the parties is to govern. Did the legislature, then, intend that the rights of the plaintiffs should be limited to the width of their bridge, and that another bridge might the next day be authorized, by the side of it? The local situation and circumstances repel this construction of the grant. It is not necessary to determine how near one bridge may be made to another; if the legislature can now grant one at the place in question, they might have done it immediately after the original grant was made. Another rule of law may be here stated, that the grant of any thing carries with it whatever is necessary for the enjoyment of the thing granted. Co. Lit. 56. The object of this grant was the right to take the tolls exclusively for a limited time. We therefore stand on the ground of authority as to the right of the plaintiffs under this grant and the effect of it as a contract, which cannot be impaired by any act of the legislature. *Fletcher* v. *Peck*, 6 Cranch, 87; *New Jersey* v. *Wilson*, 7 Cranch, 104; *Terrett* v. *Taylor*, 9 Cranch, 48; *Dartmouth College* v. *Woodward*, 4 Wheat. 516; *Green* v. *Biddle*, 9 Wheat. 1. 387

But if property is thus taken for the public, an indemnity should be made at the same time; otherwise the act is void. *Constit. of Mass. art.* 10 *of Bill of Rights; U. States Constitut. art.* 5 *of Amendments. Gardner* v. *Newburgh*, 2 Johns. Ch. R. 160, and authorities there cited, are in accordance with the decisions of our own Court. *Perry* v. *Wilson*, 7 Mass. R. 393; *Stevens* v. *Middlesex Canal*, 12 Mass. R. 466; *Callender* v. *Marsh*, 1 Pick. 418. In England, by ancient statutes, a man's property could not be taken without his consent. 1 Black. Com. 139. But there, by what is called the omnipotence of parliament, any thing may be done which an act of parliament authorizes; if, however, the authority is exceeded, the party becomes a trespasser. *Shand* v. *Henderson*, 2 Dow, 519. Even in England the grants of the

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king may be relieved against ; as in *Hall* v. *Campbell*, Cowp 204 ; but in all cases where private property is taken for public uses, compensation is made in that country. In common cases of grants by the crown, a writ of *ad quod damnum* issues ; as recognised in a note to the case of *Blissett* v. *Hart*, Willes, 508–512, and *Ex parte Vennor*, 3 Atk. 766. If then the plaintiffs have the right contended for, an injunction is proper. This remedy is peculiarly proper when the defendants, as in the present case, stand in a situation like that of public agents ; and when such agents are about to exceed their authority, the Court will interpose more promptly. *Croton Turnpike* v. *Ryder*, 1 Johns. Ch. R. 611 ; *Van Bergen* v. *Van Bergen*, 2 Johns. Ch. R. 272 ; *Belknap* v. *Belknap*, ibid. 463 ; *Newburgh Turnpike* v. *Miller*, 5 Johns. Ch. R. 110 ; *Livingston* v. *Van Ingen*, 9 Johns. R. 507, 569. The ground of granting an injunction is not, that a party has no remedy at all in law, but that he has not a plain, adequate and complete remedy. It is also granted in order to preven a multiplicity of suits, and when it is difficult to obtain evi dence of every instance of damage done which would be neces
338 sary to support an action at law ; as, in cases of copy-right, for example, where it would be impossible to ascertain how many copies of a book had been sold. So in the present case it would be impossible to obtain evidence of every instance of passengers who may have travelled over the new bridge. This Court has already, in two cases, granted an injunction for nuisance before the hearing on the merits. *Mayor of London* v. *Bolt*, 5 Ves. 129 ; *Universities of Oxford and Cambridge* v. *Richardson*, 6 Ves. 689 ; *Robinson* v. *Byron*, 1 Bro. C. C. 588 ; *Millar* v. *Taylor*, 4 Burr. 2400 ; *Att. Gen* v. *Richards*, 2 Anstruther, 603 ; *Harmer* v. *Plane*, 14 Ves. 130.

A strong reason for an injunction in the present case is, that the Warren Bridge Corporation is temporary, only of six years' duration (a much shorter term than remains to the corporation of Charles River bridge), and has no right to make assessments for any other purpose than to build the bridge. The members of the new corporation are in fact like mere agents of the Commonwealth for executing this work. It may

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be added also, that the reason for having a trial at law in the first instance does not apply in this State, because that trial must be had before this Court also. The following authorities were here cited: *Campbell* v. *Hall*, Cowp. 204; *Blissett* v. *Hart*, Willes, 518; Com. Dig. *Ad Quod Damnum*, *A* 1; 22 H. 6. 14 *b*; *Ex parte Vennor et al.* 3 Atk. 766, the most recent case of *ad quod damnum*; *Shand* v. *Henderson*, 2 Dow. 519; *Goldie* v. *Oswald*, ibid. 534.

It cannot be objected that this application is premature; it was the duty of the plaintiffs to make it as soon as an injury was threatened, and not to lie by in order to take the defendants by surprise. In *Gardner* v. *Newburgh* not a spade had been put into the ground to begin the intended work. Nor will it prejudice the rights of the defendants, for they will still have the right to toll for the same length of time. Suppose twenty years had been allowed, instead of six, for the new bridge; must the plaintiffs wait that length of time before they could have this question settled? It is true, that formerly it was not the practice to grant injunctions in these cases; but of late it has been otherwise; and in *Jerome* v *Ross*, 7 Johns. Ch. R. 331, the reasoning of Chancellor *Kent* is fully in support of 389
our application. An injunction is proper as soon as an injury is threatened; this is the peculiar efficacy of a court of chancery, that we thus arrive as near as possible to perfect justice. We are entitled to this interposition until the right in controversy is tried. It is not our rights, but those of the defendants which are doubtful; our possession makes the difference, we being in by a prior grant; 2 Inst. 406; and the defendants do not deny the validity of our grant. In the case just decided by this Court, *Lowell* v. *Roxbury Chymical and Color Company*, the plaintiff had been in possession for 60 years; but we have been in possession for 160 years. Now it is a settled principle, that we are not to be disturbed by a conflicting title which itself is doubtful. Eden on Injunctions, 284. The title of the defendants is the law establishing their corporation; and it is said, that they are not wrong-doers, because they have this authority. But this is a *petitio principii*, for the very question is, whether the law is not unconstitutional, and so gives them no authority at all.

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Again; it is said the legislature have the control of all navigable waters, and so could make the present grant. But after having once granted the privilege to the plaintiffs, they could not make another grant of the same thing. Nor can it be said, that the travel has increased beyond the extent of the ferry, which at the time of the original grant employed but one ferry-boat. The plaintiffs had a right to the whole ferry; and if one boat was not sufficient, the number must be increased from time to time.

As to the effect of the ancient grant, the college had always received the tolls, and this was evidence of their assent to it; no deed was necessary to perfect their title.

Fletcher and *Aylwin*, for the defendants. The result of the authorities as to injunctions is, that the Court will never grant them unless where the right is clear and incontrovertible; to this there is only one exception, that is, where the mischief would be irreparable. *E. India Comp.* v. *Sandys*, 1 Vern. 127; *Pawlet* v. *Ingres*, ibid. 308; *Whitchurch* v. *Hide*, 2 Atk. 391; *Lord Tenham* v. *Herbert*, ibid. 483; *Lowther*
390 v. *Stamper*, 3 Atk. 496; *Anonymous*, ibid. 750; *Baines* v. *Baker*, Ambl. 158; *Anonymous*, ibid. 209; *Field* v. *Jackson*, 2 Dickens, 599; *Anonymous*, 1 Ves. sen. 476; *Anon.*, 2 Ves. sen. 414; *Welby* v. *Duke of Rutland*, 2 Bro. Parl. C. 39; *Weller* v. *Smeaton*, 1 Cox's Ch. R. 103. From these cases it appears, that the decisions had been uniform until the time of Lord *Eldon*; and that the court would not interfere in questions as to the rights of contending parties. *Pillsworth* v. *Hopton*, 6 Ves. 51; *Smith* v. *Collyer*, 8 Ves. 89. In New York, also, Chancellor *Kent*, though disposed to go as far as Lord *Eldon* had in some cases, yet adhered to the general rule. *Croton Turnpike Co.* v. *Ryder*, 1 Johns. Ch R. 611; *Gardner* v. *Newburgh*, 2 Johns. Ch. R. 162; *Van Bergen* v *Van Bergen*, 3 Johns. Ch. R. 287; *Ogden* v. *Kip* 6 Johns. Ch. R. 160; *Jerome* v. *Ross*, 7 Johns. Ch. R. 332, 336. The text writers are in accordance with these decisions Mitf. Plead. 117; Cooper's Eq. Pl. 150.

In the next place, the plaintiffs do not show a *primâ facie* right; their charter has no terms of exclusion in respect to other grants of bridges on that river; and no restriction as

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respects the public, except that they shall have the toll for 40 years; it is nothing more than a license to build a bridge and take toll till they were reimbursed. The grant was made at their own instance; and such a grant by the crown, according to the rules of law, is to be construed most beneficially for the crown. 2 Black. Com. 347. This was, moreover, a grant of a bridge over navigable waters; which, but for this act, would be a nuisance at law. The act of 1792, granting West Boston bridge, was passed only for the purpose of authorizing that work; the language of the preamble, cited by the plaintiffs, only means that the legislature were willing to encourage enterprize. Nor does it appear that the consent of the plaintiffs was then asked to that act. In the case of *Commonwealth* v. *Charlestown*, 1 Pick. 180, the rule of law is recognised, that navigable waters are public property, and it is not to be presumed on light grounds, that the legislature have granted an exclusive right in them; but if exclusive, then we ask, to what extent; does it extend the whole course of the river? There was no pledge of the government not to make other grants, as was done in the cases of Henry Knox's 391
Canal, 1 Spec. Laws, 357; and John L. Sullivan's exclusive right of steam navigation; and the N. York cases cited in 9 Wheat. 97, note *a*. The claim of the plaintiffs is in the nature of a monopoly, which is not to be favored. Mass. Bill of Rights, *art.* 6. But the plaintiffs make a further claim, as assignees (under the college) of the property of the ancient ferry. But if so, why provide an indemnity for them and not for the owners of the ferry in the grant of West Boston bridge. We had supposed it necessary for them to show some assign ment or transfer; otherwise no rights passed. Besides, the *income* only, and not the ferry, was granted. Winthrop's Journal, by Savage, *vol.* 2. *p.* 88. But the plaintiffs rely on the acquiescence of the college, and say that the ferry became extinct; that there had been a non-user for 40 years. Can the plaintiffs, under the right to have a ferry, prescribe for a bridge? The legislature might have made them succeed to the rights in the ferry; but neither in the act of 1785 nor 1792, is there any transfer, or any surceasing of the ferry. This is an incorporeal hereditament and passes by grant alone;

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and if a freehold, as contended, then a deed is necessary We say further, that the plaintiffs, by their own showing, set out a title in the defendants from the same source with their own, a grant from the legislature. Here then are conflicting rights, and this Court will not interfere in such a case, upon a preliminary motion, before those rights are settled by a trial at law. The principles which govern this case, are to be found in the case of *Callender* v. *Marsh*; the present is a case where there may be a consequential injury without redress. The plaintiffs have stated themselves out of court, according to the law recognised in *Smith* v. *Collyer*, 8 Ves. 89; *Storm* v. *Mann*, 4 Johns. Ch. R. 21. But we further say, that no nuisance as yet exists; the proposed bridge is not erected and no travel is yet diverted from the plaintiffs' bridge. The Court will not interfere in such cases. 1 Fowl. Eq. Pract. 157. Besides, the general doctrine is not contested as to unlicensed ferries; but the plaintiffs may be challenged to show any cases where it was applied to ferries which
392 were established by authority. It is said by the plaintiffs, that the Warren Bridge Corporation has no funds, and that the plaintiffs could have no benefit by resorting to a remedy at law. But there are the materials of the bridge and the tolls. This, however, is no reason for interfering in the case. The recent statute is of a limited character, and does not give the authority required for the plaintiffs' case. We contend, that the plaintiffs have a plain remedy at law, by an action on the case; that the grievance in this case does not come within the definition of a nuisance; that the late statute uses the term in a popular sense, intending those nuisances which affect life or health; and the legislature did not intend to have conflicting rights tried in this manner. Courts of equity have not been favorite tribunals with us, and the late State convention refused to establish an equity court by a constitutional provision. The Bill of Rights gives a trial by jury; but this act leaves it at the discretion of the court to gran such a trial or not. The cases cited by us show a course of adjudications in equity from the time of Lord *Somers* to Lord *Mansfield*, that in cases where the right is doubtful,

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the court will not interpose by an injunction until there has been a trial at law.

This act is also in conformity with the practice of the legislature; as in the cases of West Boston Bridge, Canal Bridge, and the Western Avenue Turnpike. The public convenience and necessity are to be inferred, or the act would not have been passed.

In the cases cited, where injunctions have been granted, the parties were trespassers; but here we have authority from the legislature. In the New York cases, the parties actually used the plaintiffs' turnpike except just by the gates, which they avoided.

We may add, generally, that the chancery jurisdiction has never been a favorite one with the people of this State; and the equity powers of this Court are not to be extended. In England also, this controlling power of chancery has been much complained of. Park's Hist. C. of Chanc. 260. [Parker C. J. As matter of history, it will be recollected, that this province passed two laws establishing a chancery jurisdiction, but they were both rejected by the Crown.] In the present case, especially, it is not to be extended, in order to favor a grant which gives a monopoly. 39.

A few days after the hearing, the following opinion of the Court was drawn up by

PARKER C. J. Both parties, by their counsel, have been fully heard upon the question, whether the injunction moved for should be granted; and after sufficient deliberation the Court are unanimously * of opinion that the motion cannot be granted, for the reasons which will be stated.

We wish it to be understood in the outset, that the decision on this motion is wholly independent of any opinion upon the main question hereafter to be tried, whether the act of the legislature incorporating the Proprietors of Warren bridge is valid against the Proprietors of Charles River bridge, so as to justify the diminution of their income by withdrawing travellers and passengers from the latter bridge. No such opinion has been formed, and we have purposely excluded that question

* *Wilde J* was present in consultation, but not at the hearing.

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from our discussion upon this motion, any further than to satisfy ourselves that there was ground of controversy. And we think it will be unsafe for either party to found any hope or expectation of the final result of this bill upon the failure of the present motion, for it will be seen in the course of these remarks, that there was no occasion to go into the general merits of the case, in order to discharge our present duty, and we have not therefore thought ourselves authorized, in the actual state of the proceedings, when only one party is formally before the Court (the time for answer not having arrived), to decide or even to deliberate upon a question on all hands deemed to be of magnitude and importance.

That question is of a nature not to be sought for by any one holding a judicial seat, but not to be avoided when duly and legally presented. When it assumes a shape which involves the rights and interests of corporations or individuals, it will be met with due deference to legislative authority and due re-
394 gard to the constitutional rights of the citizen. We should have been glad, upon the whole, if the proceedings had been so matured that we could with propriety have passed upon the great question which is brought up by the controversy, because suspense on such occasions cannot but be injurious ; but the forms of law and the rights of parties require time and preparation, and whatever may be lost by delay in particular cases, is amply compensated by the security and stability resulting from cautious and formal deliberation.

The act of the legislature under which this bill is filed, and which gives us authority to sustain the present motion, was passed but a few months since. Until then there was no jurisdiction over waste and nuisance, except by action or indictment at the common law, or process under the statute of 1801, c. 16. These admitted of no preventive measures, but left the subject of the complaint as it was found, until a final adjudication. The legislature without doubt saw, that in many cases public safety and private security required more prompt and efficacious relief than could be had in the customary mode of redress. Nuisances may affect the life, health or comfort of the citizens of a neighbourhood ; the mischief threatened may be accomplished while a prosecution is pending. Regard to these

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great objects seems to require that there should be a power to restrain as soon at least as the mischief commences ; and in regard to nuisances strictly private, — such as the unlawful interference with a pre-existing right, the interruption of light and air, the diverting or corrupting of water, the subduction of profits from a market, mill or ferry, — that where the right to the enjoyment is clear and uncontroverted, and effectual relief or compensation is doubtful, the mischief shall be stopped or even prevented by the power of the public. And this may be beneficial as well to the agent as to the sufferer, for it may protect him from an expense, which a subsequent adjudication may render wholly useless. Attributing, as we ought, a wise regard by the legislature, in their public and general laws, to the wants and well being of the community, we must suppose that it was a sense of the imperfect state of the law in the above particulars, which led to the adoption of the act in question, and if wisely administered by the judicial power, it will without doubt be found salutary. 395

The motion however which we are considering has been met by a denial of the application of the statute to such a case as is presented by the bill. In other words, it is alleged that the Court, in its chancery character, has no jurisdiction over the subject, because the legislature intended to bring within the law only nuisances of a different description, those which more usually come under the denomination of common nuisances, although they may be particularly injurious to individuals.

This Court has no desire to extend its jurisdiction in equity beyond the clear and undoubted meaning of the legislature in conferring it. Hitherto we have taken none by implication. In the first case which was decided under the statute of 1817 (17 Mass. R. 327) the reasons were given for construing the grant of jurisdiction in equity to this court of common law, strictly, and the same reasons still exist. We consider each act of the legislature which has successively granted that power, as specific in its nature, and that the powers are not to be extended to cases or subjects not expressly designated, because we are bound to suppose that it was intended to limit the new

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jurisdiction to such cases only as had been determined to require its application.

It is to be observed, however, that this jurisdiction, though limited and restrained in regard to the objects, is wholly unlimited in regard to the means of executing it, for in all the various statutes which have been enacted, plenary power is given to execute orders and decrees by all such writs and processes as may be necessary to attain the end, so that in regard to the mode of proceeding and the execution of the authority vested in any given case, the Court is restrained by nothing but by paramount law, the constitution, and is necessarily referred to the rules and forms of proceedings in other courts of equity for its guide. When the legislature give jurisdiction over any particular subject in equity, they cannot but have in view a
396 system of equity well known in the history of jurisprudence, and known to be a branch of legal science; for otherwise (which cannot be presumed) they must have intended to refer such subjects to the will of each particular judge who should be authorized to enforce the authority; and therefore it becomes the duty of the Court to consult the precedents of courts of chancery of England and our sister States, as in a common law proceeding we recur to a similar source of authority or information. When the jurisdiction is doubtful, therefore, we must look to books to see whether it has been exercised by other similar tribunals, and when the subject matter of the power is expressed in technical words, we must ascertain the use and meaning of the terms by a similar reference.

It so happens, however, that hitherto nothing has been left to doubt and conjecture as to the subjects over which jurisdiction is intended to be conferred. The statute under consideration is not less explicit than those which preceded it, leaving no room, we think, to doubt of the real intent of the legislature "The justices of the Supreme Judicial Court may hear and determine in equity any matter touching waste or nuisance in which there is not a plain, adequate and complete remedy at law."

In considering then whether any particular subject of a bill is within the jurisdiction of the Court in this form, we have only to inquire whether it is a matter touching waste or

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nuisance, and then whether there is such remedy at law as falls within the restriction. Now what is or is not a nuisance is very clearly stated by the books of the common law, and among other things it is clear, that to establish without right a ferry so near to one before rightfully existing as to draw away the passengers and diminish the profits, is a nuisance. So in regard to markets or fairs, where they may be private property So in some cases in regard to a mill, or the obstructing or diverting of a water-course, and many other subjects of a similar nature. Com. Dig. *Action on the Case for Nuisance, A.* There can, we think, be no doubt, that though bridges are not particularly named, because in ancient times when the law was settled there were none probably existing with a right to 397
toll that were liable to interference by unauthorized persons, yet where they do exist by lawful authority, and their profits are reduced by unlawful competition, they fall within the reason of the law, and are equally protected by it as ferries, markets, &c. Therefore taking the complaint in the bill as true, which we must do on the question of jurisdiction, we entertain no doubt, that the facts alleged are "matters touching nuisance," which come expressly within the terms of the statute.

But it is objected that by the restrictive clause in the statute, "in which there is not a plain, adequate and complete remedy at law," the case stated in the bill is excluded from the equity jurisdiction of the Court; if so, it must be because there is such a remedy for the grievance complained of.

The object of the legislature in using these words is, to preserve the jurisdiction of the common law in all cases where that is capable of affording substantial and adequate relief. It is plain that it is not intended to confine the cases for equity to that class only in which there is no relief at law, for by such construction the statute would be nugatory, there being no cases of an actual wrong for which some remedy at common law cannot be found. "Wherever there is a wrong there must be a remedy," is a maxim of the common law, and when there is no writ in the register, one will be framed to suit the case. But there are many cases in which the remedy may be defective; that is, not adequate and complete

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The common law furnishes a remedy for the breach of a contract, but that is not always complete; for the strict execution of the contract may be more desirable than a compensation in money for the breach; and the party is entitled, upon principles of right and equity, to have the thing done which is contracted to be done; and it is the highest eulogy of a court of equity, that it can compel a performance of promises on contracts, instead of leaving the injured party to an uncertain recompense in money. So a man contracts to abstain from doing something, and the court of equity, instead of
398 allowing him to do it and pay for his voluntary breach of faith, lays its hand on him and compels him to abstain.

These are cases where the common law furnishes a reme dy, but it is incomplete, and equity steps in to supply the defect. In short, the limitation in the statute shows an in tention to give the jurisdiction as it exists in chancery in England, for there it is only where there is no remedy at law, or only an insufficient one, that the chancery powers are in force.

Now in regard to nuisances of a private nature, though there is an action on the case for damages, it is plain that this remedy is inadequate and incomplete. The party may recover his damages, but the nuisance continues; he may repeat his action, but still he does not remove the mischief. The offending party may be obstinate or malicious, or he may take his chance of being obliged to pay less than he can gain by the nuisance. A power to restrain him, by means which he cannot resist, would seem to be essential to the due administration of justice. And such a power is equally salutary, where one having a clear right to the use and income of property, is intercepted in the enjoyment of it by one usurping upon his rights.

To apply the principle to the case stated in the bill, taking again the facts as alleged to be true. The complainants are in the actual enjoyment of a franchise granted by the Commonwealth, yielding them a profit, for which they paid a valuable consideration, and entered into some obligations which are yet in force. The respondents, *without authority*, erect a bridge so near to theirs as to make it certain that their income will be

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reduced. An action will lie for this injury, and damages may be recovered, and so *toties quoties* as the injury is renewed or continued. But the injury remains, the damages are uncertain, and the ability to pay is doubtful. Without doubt this is such a case as the legislature contemplated, for the remedy is incomplete. Nothing short of an absolute prevention of the evil is a complete remedy, and a court of common law is incompetent to afford this.

But it is objected, that by this extensive construction of the statute, the parties will be deprived of their right to a trial by 399 a jury, which is secured to them by the 15th article of the declaration of rights. If this be the effect, the act itself is void, for the legislature cannot ordain a process by which controversies respecting property shall be ultimately decided without a trial by jury. We think however the act is not exposed to this objection, for it provides, "that whenever it shall be necessary and proper to have any facts tried by a jury, it shall be done in such manner as the Court shall direct." Now whenever a party in a suit in equity shall require that any controverted fact be tried by a jury, the Court, by force of the article above mentioned, (though the act is not imperative,) will be obliged to order an issue for that purpose, and thus the constitutional security is preserved. So in regard to all the preceding statutes giving jurisdiction in equity, some of which do not provide for a trial by jury, this constitutional provision must be enforced by the Court.[1]

With respect to public nuisances, which are misdemeanors, there may be more question as to the application of this statute. Certainly if proceeded against criminally, in order to obtain an abatement and the punishment of the offender, it must be done by indictment, or in some cases by information at common law, or in the manner provided in the statute before cited. But even in regard to some of these, those for instance which affect the health or comfort of a neighbourhood, since each individual is particularly annoyed, perhaps the remedy by this statute, at least so far as to procure immediate relief by injunction, is proper. But of this we give no

[1] See Revised Stat. *c.* 106, § 6; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 367 *et seq.*

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opinion, the case before us being one of a private nuisance only.

We are satisfied, for the reasons above stated, that the Court has jurisdiction of the subject matter of the bill,[2] and we proceed to inquire whether the present motion shall be granted. The motion is for an immediate injunction to restrain the respondents from building or continuing to build the bridge which is the subject of complaint in the bill. Indeed it is part of the prayer of the bill itself, that an injunction immediately issue, before answers filed or any hearing of the merits of the complaint, except those which are stated in the bill itself, supported by affidavits which sufficiently prove the principal facts.

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To us, who have been used only to common law proceedings, it could not but appear a novel application, to award process in nature of an execution against a party who had been only summoned to hear a complaint against him, but whose time of appearance had not yet come. It seemed to resemble a little the course ascribed to the judge renowned in classic poetry, *Castigat auditque*. But upon examining chancery decisions in England and New York, we are satisfied that there are cases which require the exercise of the power of preventing, as well as compensating mischief; and confining the exercise of this power to cases like those to which it has generally been applied, it is a wholesome if not an essential branch of equity jurisdiction. The power existing in fact in those jurisdictions which have been mentioned, at the time when our statute was enacted, there can be no doubt it was intended to be conferred on this Court by that statute. Probably if it had not been expressly granted, it would have been thought necessarily to result from the jurisdiction given, "of any matter touching waste or nuisance," and the power to issue all writs and processes necessary to enforce that jurisdiction; for we must of necessity have resorted to the decisions of other courts to know what was intended by the terms made use of. But to put the matter out of all question, the legislature have in

[2] See Revised Stat. c. 81, § 8; *Bemis* v. *Upham*, 13 Pick. 169

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the same statute enacted, "that any one or more of the justices of this Court in term time, or in vacation, may issue writs of injunction to stay any waste or nuisance, and make such orders and decrees relative thereto, and issue such processes proper to enforce the same, as justice and equity may require."[1]

The power therefore to issue writs of injunction for the above purpose is limited only by the judicial discretion of the court or judge, which discretion is to be enlightened and guided by the practical exercise of it by the eminent tribunals in which equity jurisprudence has been administered. Upon consulting the recorded doings and opinions of those tribunals, we find that this power of prejudging a case, so far as to prevent the continuance of an alleged mischief until the party complained of has an opportunity to answer, is but sparingly exercised, and only upon cases which hardly admit of controversy. Upon the first application to Lord *Hardwicke* he was startled, and said it was wholly unprecedented, and almost indignantly dismissed the motion. 2 Ves. sen. 414. But since that period injunctions have frequently been applied for, and sometimes obtained, before any trial at law or hearing of the merits, and in most, if not all of the cases wherein they have been granted, substantial justice and the security of the party aggrieved seemed to require the interposition of this saving power. 401

The principle on which the English courts of chancery have proceeded in the use of this extraordinary power, is urgent necessity; to prevent the destruction of property, or such invasion of rights as will hardly admit of a full and fair recompense, if it is suffered to proceed until there can be a judicial determination of the case.

And they further require, to support such an application, that the subject matter of the complaint, that is, the property injured or menaced, or the right invaded, should be free from controversy; for if there be a controversy, they uniformly refuse to interfere in this summary mode. Such a preliminary injunction has scarcely ever issued unaccompa-

[1] See Revised Stat. *c.* 106, § 7, 8, 9.

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nied by a declaration of the extreme reluctance with which it is granted; and well it may be so, for it is to a certain extent deciding the cause upon a hearing of one party only; which is so contrary to the common principles of justice, that nothing but extreme necessity will justify it. Chancellor *Kent*, in one of his decisions, says, "it must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, that will entitle the party to this relief." 3 Johns. Ch. R. 287. And in another, "that the process of injunction is too peremptory and powerful in its effects to be used without the clearest sanction, and that he should better consult the stability and the utility of the powers of the court of chancery, by not stretching them beyond the limitation prescribed by the precedents."

Coming to the exercise of this jurisdiction, hesitatingly and sparingly conferred by the legislature, so recently as we have done, and accustomed as we have been to the restraints of the common law, it cannot be expected that we shall be more ready to extend power by construction, than those who have been long familiar with this useful though somewhat indefinable branch of jurisprudence. Our statute, it is true, gives general power to issue writs of injunction to stay waste and nuisance, but the very generality of the terms implies a limitation by some known course of proceedings in similar tribunals. Many cases have been cited in the argument, but the result of them all seems to be, as expressed in the words of Eden, "that though the court is in general averse to interfering before a trial, yet if a case of nuisance is clearly made out upon affidavit, it will nevertheless be granted or continued until such trial shall have been had." Eden on Injunctions, 237.

And this rule has been adopted in several cases which have occurred since the enactment of our statute. An actual nuisance has been proved to exist, and it was manifest that the continuance of it until a trial could take place, would expose the health if not the lives, and certainly destroy the comfort of a neighbourhood. Such cases were, without any doubt, contemplated by the legislature as proper subjects of

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this restraining power, and all will admit, in regard to these, that this act of the legislature was called for by a due regard to the health, comfort and convenience of the citizens.

And it seems to follow as a just and necessary inference from this rule, that in certain cases where the nuisance does not yet exist, but preparations are made to create it, and if suffered to be completed it will produce great and irreparable mischief, a preventive power should be exercised, and the party kept from advancing until his right shall be established to do what he has undertaken. On this branch of the power there has been doubt, and the existence of it has been denied in argument; but considering its salutary nature, and that it has been exercised in England for a long series of years, and in the chancery court of New York, we think it was within the intent of the legislature, that the power of this Court in regard to injunctions should be no 403
otherwise restrained than by sound legal discretion in the judge who may be called to administer it.

It is seen then, that by the construction given to this act of the legislature, the present application for an immediate injunction is to be determined in some measure by our opinion of the necessity which exists for it in this particular case. The case to be made out is, that from the facts stated in the bill, it is manifest and clear that the completion of the undertaking will necessarily and unavoidably create a nuisance to the plaintiffs, that is, that it is clear that they have a right by virtue of their charter, or of their derivative right to the ferry from Harvard College, to the exclusive privilege of transporting passengers between Charlestown and Boston over their bridge, or such one as they may construct, or at least that they have the exclusive right to the transportation of those who may pass over the new bridge, if that shall be erected. Now if this be true as stated, it is a proper case for immediate restraint, upon the principles above recognised; but the exclusive right, which is the turning point of the case, is denied by the respondents. They say that there is no express grant of exclusive right in the charter, and that such right is not to be inferred as an implied covenant, but that all that was granted was

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a license to build a bridge across Charles river at the ferry ways, and that any succeeding legislature, acting with a view to public convenience or necessity, had the same right to grant another bridge as the legislature of 1785 had to grant the first. They therefore claim a right to do what they are complained of for doing, and what the Court is called on to restrain, under legislative authority; which indeed is set forth in the plaintiffs' bill.

Now can we say it is *clear and incontrovertible*, that the act under which the respondents are proceeding is unconstitutional and void, because it impairs the contract supposed to be contained in the former act? We may come to this conclusion after a full hearing and due deliberation, and if we shall, our duty will be clear and the disposition to do it unshackled; for no one can doubt that the constitution is above any legislative act.

404 Again, it is said the right of the plaintiffs is clear, because the place where they have built their bridge is the site of an ancient ferry, formerly belonging to Harvard College by grant from the government, and transferred by the college to them. But on the other side it is said, that there is no transfer of such right; that the provision in their charter for the annual payment of £200 to Harvard College, amounts only to a compensation provided by the legislature for the temporary loss of the ferry, by means of the bridge they had authorized; and that this, though consented to, and received by the college, transferred no right, but was only a satisfaction for damages. Can we say that this is so clear and incontrovertible as to authorize us to proceed in this summary and *ex parte* manner? We think there may be a question on both points, and therefore, within the decided cases, we ought to refuse the motion so far as it depends upon these grounds.

Again, it is said, that by their charter there is secured to them the enjoyment of toll from all passengers who would cross their bridge, if the new one should not be erected; and that admitting the legislature have the power to authorize another bridge if the public necessity and convenience should require it, yet as thereby their property will be af

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ected and impaired, there was no authority in the legislature thus to interfere without providing an indemnity for their loss. The principle is clear and incontrovertible; it is founded on an express provision in the declaration of rights, and would be required by the everlasting principles of justice, and of the social compact, even if it had not been expressly sanctioned. But is it as clear and incontrovertible, that the case of the plaintiffs comes within the principle?

This depends on the former question, what was the grant, what was the contract; was it of an exclusive privilege to any extent, which is invaded by the new act? If so, the act is invalid, for it provides no indemnity.[1] If not so, there is no case for the application of the principle. The plaintiffs certainly make out a very strong case of exclusive right, by implication; but it is contended on the other side, as before, that no exclusive property was granted; that the public necessity required a new bridge; that the legislature alone could judge of this necessity; and that they have determined the question. Now here is certainly a case of very serious controversy; and although we may hereafter, if it should become our duty, decide that this was a proper case for indemnity, we think it does not become us, on a question discretionary in its nature, to decide so promptly against a deliberate act of the legislature, as we must do by granting this motion. It is enough for us to see, that there is room for argument, to authorize, and indeed to require us, to withhold the process prayed for. And in thus deciding, we do not certainly go counter to the decision of the courts of chancery in England or New York.[1] 105

It is said that whenever a person is in the enjoyment of any purchase or privilege under a legislative or government grant,

[1] See *Comins* v. *Bradbury*, 1 Fairfield, 447, 2 Kent's Comm. (3d ed.) 339; *Enfield Toll Bridge Co.* v. *Connecticut River Co.* 7 Connect. R. 49; *Case* v *Thompson*, 6 Wendell, 637; *Baker* v. *Boston*, 12 Pick. 184; *Boston and Roxbury Mill Corp.* v. *Gardner*, 2 Pick. (2nd ed.) 39, note 2; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 519 *et seq.*, 471; *Wellington et al. Petitioners*, 16 Pick. 87.

[1] See 2 Story's Comm. Eq. 204 *et seq.*; *Gibson* v. *Tilton*, 1 Bland, 355.

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being in actual possession, the practice is to grant an immediate injunction against any who shall disturb or threaten to disturb him. We do not refuse to acknowledge this to be a correct rule; and the cases cited to support it sufficiently show the extent and application of it. They are most generally cases of patent and copy rights; and in those, the right in the party seeking relief is considered *quasi* of record, and the extent of the right invaded is clearly defined; and besides, the mischief of suspense would be irremediable to a considerable degree. But even in such cases, a long possession and exercise of the right under the patent or law is required to be shown. 3 Meriv. 622, 624, 628; 4 Ves. 130.

Is the case before us so like these cases as to require the same adjudication? Of what are the plaintiffs in possession? of an exclusive right to take toll from all persons who pass Charles river, between Charlestown and Boston? or of the right to take toll only of those persons who shall actually pass their bridge? Now the solution of this question depends upon the determination of the first, what is their grant, their contract, what rights did it confer? To say that they were in the actual possession of the franchise of toll from all travellers
406 who should go through Charlestown to Boston, is *petitio principii*, an assumption of the very thing in controversy.

Upon the whole then we are satisfied, that this is not one of those clear and uncontroverted cases of nuisance which form a class for the operation of the summary process sought for.

The case cited in the argument which comes nearest to this, is that of *Gardner* v. *Newburgh*, 2 Johns. Ch. R. 162. There the injunction was against persons acting under a legislative act, because they were about taking away a valuable privilege from the complainant for a purpose of a public nature, the act making no provision for indemnity. The private property was clear and uncontroverted, and it was equally clear that the legislative act was void against the complainant. This was decidedly a proper case for the exercise of this power. In the case before us, the very property said to be threatened, is denied. The bill itself shows it is denied. We cannot prejudge the question.

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So in the case cited, where an injunction was granted against commissioners who had exceeded their authority. The common principle is, that where officers of the government have authority to take or meddle with the property of a subject or citizen in a special manner or to a limited extent, in whatever they may do in any other manner or to a greater extent they are not protected, and they may be treated as trespassers. But the case before us is, where the respondents act within the authority granted, and the question, which certainly must always be a serious one, is whether that authority is void.

There is however another class of cases in which injunctions are sometimes granted without trial, though the fact of nuisance or injury may not be uncontroverted; and that is when the delay or allowing the mischief complained of to continue, will produce destruction of the property, without any sure means of compensation for the loss. As in some cases of waste; some of repeated and continued trespasses; some interruptions of enjoyment or of property, where compensation in money will be inadequate, or uncertain on account of the inability of the party to pay. And this has been supposed to 407
be such a case, because, it is said, if this bridge should be finished and open for travel, it is so situated that a portion, probably a large portion, of the income of the complainants will be withdrawn, and their remedy at law will be inconvenient on account of the multiplicity of suits which will be necessary, and the limited responsibility of the respondents as a company. This we think, under the circumstances of the case, might be good ground for the interposition prayed for, if the apprehensions of the complainants were well founded. But we think the danger does not exist, and that if the case should be finally made out, the remedy will be perfect and complete. In the first place, if the act under which the respondents are erecting the bridge is void, it is a nullity, and the individuals composing the company will all be liable, to the extent of their property, in suits at common law. But such suits will not be necessary, except for so much toll as may be lost between the opening of the bridge and the final adjudication; for this injunction, as Chancellor *Kent* says, is a prompt and powerful engine, and is accompanied with penalties which may be in-

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creased until the object is accomplished; and in addition to this, there is no doubt that a forcible abatement by the power of the Commonwealth will be awarded by this Court under this bill, if the bridge shall be found to be a nuisance; there is then no necessity for anticipating measures. *Festina lente* is never more proper than in judicial questions on controverted rights.

We conclude as we began, by a caution to the parties, and to others interested in the question, to all who may wish to speculate on the result, or whose projects and schemes are connected with the maintenance or overthrow of the bridge, that we consider the question of the validity of the grant or charter of the new bridge as open and undecided as it was before this motion was made.

Such things as were proper for us to decide, we have decided. We have given the construction of the statute. We have determined that we have jurisdiction of this case. On these points the case can never be argued better than it has been, and therefore we decide. On the great question we
408 have purposely kept our minds free, because the time has not come to hear or decide.

If the complainants think this hard, we say, as did Lord *Hardwicke* when he dismissed a similar motion — "In a plain case of waste or nuisance an injunction may be granted before answer, because the court will not suffer it to go on to prejudice the party in the mean time, but will stop it before hand; but now you come in a very special and particular case. As you have given them notice by filing your bill, and stronger notice by this motion, if they do wrong it is at their own peril, and it might be ground for the court to order their building to be pulled down." [1]

[1] See *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344; *Enfield Toll Bridge Co.* v. *Connect. River Co.* 7 Connect. R. 28; *Piscataqua Bridge* v *N. H. Bridge*, 7 N. Hampsh. R. 57

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1828, AT LENOX

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

JOHN WARD *versus* WILLY BARTHOLOMEW.

In a writ of entry, the want of an averment of seisin in the demandant is cured by a verdict that he was disseised, and he is entitled thereupon to be reseised of at least an estate of freehold.

Where an individual, under a resolve of the legislature authorizing him to sell, by a quitclaim deed, land belonging to the Commonwealth, gave a deed in his own name as agent, and under his own seal, the deed was held valid.

Held also, that he did not exceed his authority by warranting the land against all persons claiming under the Commonwealth, that being no more than the legal effect of a sale.

Held also, that it was not necessary to recite in the deed the particular acts which the resolve required to be performed in making the sale.

A deed conveying all the lands belonging to the Commonwealth "between the old west line of S. and the east line of M. W." (adjoining towns,) is not void for uncertainty of description.

A grant of land by the Commonwealth will pass its title, notwithstanding an adverse possession, the Commonwealth being incapable of being disseised.

Successive disseisins do not aid one another in creating a title by possession. Thus where a disseisor conveys part of the land, and the grantee, under color of the deed, enters upon the whole, the possession of the first disseisor will not avail the grantee, in regard to the part not embraced by the deed.

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Ward v. Bartholomew.

THIS was a writ of entry, in which the demandant claimed an undivided third part of a certain tract of land in Sheffield, "whereof the tenant unjustly, &c. disseised the demandant within thirty years." The tenant pleaded *non disseisivit*.

At the trial, before *Wilde* J., the demandant offered in evidence a resolve of the legislature, passed June 11, 1824, authorizing Jonathan Allen to sell at public vendue, giving thirty days' notice of the intended sale, all the land belonging to the Commonwealth in the towns of Sheffield and Mount Washington, and to make and execute deeds of release to the purchasers, on their giving good and sufficient security to the treasurer of the Commonwealth for the purchase money, payable at such times as Allen should think advisable, with interest.

Under this resolve Allen sold and conveyed the premises described in the writ, to the demandant and two others, by a deed made and executed by him as agent of the Commonwealth. The tenant objected to the admission of the deed in evidence, because it was not given, as he contended, in pursuance of the resolve, not being in the name of the Commonwealth, and also because it was void for uncertainty in the description of the premises; but these objections were overruled.

The tenant then offered evidence tending to show, that at the time when the deed was executed, he was in possession of a part of the demanded premises, claiming the same as his own, and having the same fenced and enclosed, and thereupon contended that for this reason nothing passed by the deed to the demandant. This objection was overruled.

The tenant then offered evidence tending to show that he, and those under whom he claimed, had had possession of part of the demanded premises for thirty-five years; but it appeared that the tenant himself had not been in possession so long as thirty years before the commencement of this action; and on producing his title deed, it became a question whether it
411 included any part of the demanded premises; and it being a question of bounds, the evidence relating to it was left to the jury, and they found that the deed to the tenant did not extend so far as to include any part of the demanded premises.

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and they returned a verdict for the demandant. On this last point the jury were instructed, that the tenant could not claim any title or possession in his grantor beyond the limits described in his deed above mentioned, and if his grantor had possession beyond those limits, it was immaterial in this case, if they should find that the grant to the tenant did not include any part of the demanded premises.

Ward v. Bartholomew.

If the foregoing decisions were correct, the verdict was to stand; but otherwise a new trial was to be granted.

The tenants moved in arrest of judgment, because the declaration did not allege any seisin in the demandant or his ancestor.

Dwight and *Barnard*, in support of this motion, referred to 1 Saund. 221; *Rushton* v. *Aspinall*, 2 Doug. 679; 6 Dane's Abr. 83, 274; *Green* v. *Liter*, 8 Cranch, 229. It is true the jury have found that the demandant was disseised, but whether he was seised of an estate in fee or of freehold, is not determined by the verdict.

Sept. 18th, 1827

In regard to the points made at the trial, they insisted that the deed from Allen was void, because the resolve had not been strictly pursued. *Taylor* v. *Horde*, 1 Burr. 120; *Knox* v. *Jenks*, 7 Mass. 488. The effective words of conveyance are in the name of Allen as agent of the Commonwealth, instead of being in the name of the Commonwealth. *Fowler* v. *Shearer*, 7 Mass. R. 14. The seal of the Commonwealth should have been affixed to the deed. Jacob's Law Dict. *tit. Keeper of the Seals.* The resolve authorizes a *release* only, but the deed is a *grant*, with a *covenant of warranty* in the name of the Commonwealth, against the lawful claims of any person claiming under the Commonwealth. *Nixon* v. *Hyserott*, 5 Johns. R. 58; *Gibson* v. *Colt*, 7 Johns. R. 390. The deed does not recite all the particulars required to be done by the agent, and is therefore void. It is void too for uncertainty in the description. It purports to convey, in general terms, all the lands belonging to the Commonwealth between certain lines, namely, the old west line of Sheffield and the east line of Mount Washington, containing 400 acres, it not being pretended that all the lands between those lines belonged to the Commonwealth. Shep. Touch. 245;

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Worthington v. *Hylyer*, 4 Mass. R. 196 ; *Jackson* v. *Delancy*, 13 Johns. R. 537 ; *Jackson* v. *Rosevelt*, ibid. 97.

The evidence offered by the tenant to show that he was in possession of part of the demanded premises, claiming the same as his own, so that that part did not pass by the deed to the demandant, was improperly rejected. 5 Mass. R. 577 *Mayo* v. *Libby*, 12 Mass. R. 343 ; *Jackson* v. *Joy*, 9 Johns. R. 102. If the Commonwealth cannot be disseised, it may be ousted by intrusion, and some legal process is necessary to reinstate it in the possession ; and if, therefore, the tenan' was in the actual possession, the deed was inoperative. *St.* 1791, *c.* 13, § 2, 3 ; 6 Dane's Abr. 81 ; *St.* 9 *Geo.* 3, *c* 16 ; 1 N. R. Laws of New York, 184.

The instruction to the jury was incorrect, whether the deed to the tenant did or did not include any part of the demanded premises ; for an uninterrupted adverse possession for thirty years, whether by one or by several persons, would be a bar to the action. *Fanning* v. *Willcox*, 3 Day, 258.

C. A. Dewey, for the demandant, to show that the defect in the declaration was cured by the verdict, cited 6 Dane's Abr. 274 ; *Kingsley* v. *Bill*, 9 Mass. R. 199 ; *Spear* v. *Bicknell*, 5 Mass. R. 132 ; 1 Saund. 228*a*, note 1 ; *Booden* v. *Ellis*, 7 Mass. R. 507.

He admitted that the deed from Allen as agent, and under his own seal, might have been void, had he been the agent of an individual, though there were authorities to the contra ry ; *Wilks* v. *Back*, 2 East, 142 ; but the case is different where the Commonwealth is the grantor. This is a statute conveyance, and it is made in the manner usually pursued in this Commonwealth in regard to public lands. The land passes by the resolve, and the authority given to Allen was merely to designate by deed the person who was to take *M'Millan* v. *Eastman*, 4 Mass. R. 378 ; *Commonwealth* v. *Heirs of André*, 3 Pick. 224 ; *Lambert* v. *Carr*, 9 Mass. R
413 185 ; *Mayo* v. *Libby*, 12 Mass. R. 339 ; *Springfield* v. *Miller*, ibid. 415 ; *Codman* v. *Winslow*, 10 Mass. R. 146. The covenant of warranty against all persons claiming under the Commonwealth, is according to the usual form of quit-claim deeds in this country. It does not amount to a warran

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ty. But if the agent, in inserting this covenant, exceeded his authority, the objection cannot be made by a stranger. *Knox* v. *Jenks*, 7 Mass. R. 488.

The other objections are answered in the opinion of the Court.

Per Curiam. As to the motion in arrest of judgment, the count on which the verdict is returned is remarkably defective; and upon general demurrer the defect would have been fatal. We are of opinion however that it is cured by the verdict, upon the liberal ground lately adopted by courts of law, in order to prevent expense and delay after a trial of the merits of a case. The principle stated by Chitty, and Williams, in his notes to Saunders, is, that whenever any essential facts are imperfectly stated or even wholly omitted in a declaration, if the verdict be such as would not, under the direction of a court, have been returned without proof of the facts so imperfectly stated or omitted, it shall be presumed that such proof was given, and judgment may be rendered on the verdict. [1] This declaration, though it alleges no seisin in the demandant, avers that he was disseised by the tenant. Now it is plain that such a verdict could not have been returned without proof of a seisin by the demandant, for he could not be disseised without having been seised; and no court could have allowed, nor could any jury have agreed in that verdict, unless there was sufficient evidence of the fact without proof of which the demandant could not have advanced a step on the trial. [2] It is true that a seisin only can be inferred from the declaration, plea and verdict, and that the case is still left destitute of any averment or even implication of the nature and extent of the seisin; but if seised and disseised, the demandant is entitled to judgment, and it may be a subject of future inquiry to what extent this judgment will affirm his title; if only to a freehold, still he is entitled to be reseised.

Sept. 21*st*, 1827

This rule, by which defects resulting from carelessness are passed over with impunity, may have a tendency to encourage laxity of practice; and this would be a subject of regret, were it not that the adverse party, instead of arresting the

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[1] See 1 Chitty on Pl. (6th Am. ed.) 712, 713 *et seq.*

See *Elliott* v. *Heath*, 6 N. Hampsh. R. 428.

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progress of the suit in its earliest stages, and thus saving much expense and trouble, lies by until all the expense of a trial has been incurred, and after the merits of the controversy have been settled, would overthrow the whole proceedings upon some point, which, after the trial, can be nothing to him but mere matter of form. It is for this reason that the courts will, as stated by Chitty, allow of almost any declaration after a verdict. There must have been singular inattention in the drawing of this declaration, for even in the first count, which is now out of the case, a naked seisin only is averred, without any notice of the estate of which the demandant was seised. This also would have been bad on special, and perhaps on general demurrer.

It is objected that the deed of Allen is void, because it is not in the name of the Commonwealth, and because the seal of the Commonwealth is not affixed. And the authorities are strong, that a conveyance of land by an individual must be by the principal, and not by the agent. [1] But there is a difference between grants of an individual and those of the public. [2] The government may grant without any deed; as lands in the District of Maine were frequently granted by a resolve. Since the adoption of the constitution, the committee on eastern lands have given deeds, setting forth their authority and affixing their own seals; and these deeds have been considered valid. The seal of the Commonwealth has been used chiefly for political purposes, and not for mere grants of land. This practice having continued sixty years, and perhaps longer, we cannot say that it is ineffectual. [3] In fact the land passes by the resolve, [4] rather than by the deed; only it is necessary to have some conduit to convey the title to the purchaser. We are satisfied the practice has been such, and it being the right of the government to establish its own forms, these objections to the deed of Allen cannot prevail.

415 Next, it is said that this is a deed of grant with a covenant,

[1] See *Copeland* v. *Mercantile Ins. Co.*, *ante*, 203, note 2.

[2] See 2 Kent's Comm. (3d ed.) 632, 633; *Perry* v. *Hyde*, 10 Connect. R. 329

[3] See *Thompson* v. *Carr*, 5 N. Hampsh. R. 515, 516; *Cofran* v. *Cochran*, 5 N. Hampsh. R. 458.

[4] See *Sargent* v. *Simpson*, 8 Greenl. 148.

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and not a deed of quitclaim. It is clear that if the agent transcends his authority, the deed may be avoided in some respects. But to sell is not to covenant, and the warranty against persons claiming under the Commonwealth is only the effect of the sale without any covenant. We think then, that in regard to this covenant, there is no exceeding of authority.

Another objection is made, that the deed does not recite various particulars, mentioned in the resolve, as that the sale was by auction, &c. It was necessary that these facts should take place, but not necessary to recite them. The recital might be evidence after a lapse of years, but it would be only evidence.

The deed is also said to be void for uncertainty in the description of the land; [1] but we find no such uncertainty. The boundary lines are definitely stated. The objection is rather that the words of the resolve are not used; but if the words in the deed have the same meaning, that is sufficient.

Further, it is said that the tenant was in possession, and the deed was therefore ineffectual. The general principle is, that a person held out of possession cannot pass a title, as it would tend to excite lawsuits, [2] but we have always understood that this principle does not apply to the government. [3] The very circumstance, that in England and New York, statutes have been recently passed to limit the right of the public, shows it. At the argument it was suggested that we have a similar statute restraining such right, after an adverse possession of thirty years. Whether such a statute exists or not, is immaterial; for the facts in the case show a possession of less than thirty years. But the tenant says that his own possession and that of the first disseisor have continued for thirty-five years. To connect them he must show that he holds under the first disseisor. Successive disseisins do not aid one another. The jury have found, that the extent of the land held for thirty-five years by a continuous title to the tenant and his grantor, does not cover the demanded premises.

[1] See *Brown* v. *Bellows*, 4 Pick. (2nd ed.) 190, note 2; *Jackson* v. *Moore*, 6 Cowen, 706, 720, note *a*.

[2] See *Brinley* v. *Whiting*, 5 Pick. (2nd ed.) 353, note 1.

[3] See *Hill* v. *Dyer*, 3 Greenl 441; *Kinsell* v. *Daggett*, 2 Fairfield, 317.

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Nothing being sold to the tenant except what was included in the boundaries stated in his deed, he has no right by an entry under the deed to the excess which was in the possession of his grantor. If then there were a statute barring the right of the government after an adverse possession of thirty years, it would not avail the tenant. But after the investigation which has been made by the counsel and by the Court, it seems doubtful whether any such statute exists.

Judgment according to verdict.

WILLIAM P. WALKER, Judge, &c. *versus* FALLEY GRISWOLD *et al.*

A husband purchases land, and at the same instant mortgages it to the grantor; he afterwards mortgages to another person, his wife releasing her dower, pays off the first mortgage, and dies. *Held*, that the widow had a right of dower, subject however to the last mortgage.

DEBT upon an administration bond, dated May 10, 1825. The estate of Timothy Griswold, the intestate, was represented insolvent, and the administrators, one of whom was his widow, obtained license to sell his real estate for the payment of debts. The replication stated, as a breach of the bond, that the real estate was sold subject to the widow's right to dower, when in fact she had, in the lifetime of the intestate, released her dower. The defendants rejoined that she had not released her dower; upon which issue was joined.

At the trial, before *Putnam* J., it was proved, that on the 11th of January, 1820, one Pyncheon conveyed the real estate to T. Griswold, who on the same day mortgaged it to Pyncheon to secure the payment of 2100 dollars. On the 22d of May, 1822, T. Griswold made a mortgage to S. Griswold to secure the payment of 1216 dollars, and in this last deed the widow released her dower. On the 24th of the same May the first mortgage was discharged.

Under the instructions of the judge a verdict was found for the defendants, subject to the opinion of the whole Court.

Sept. 9th. 417

Hubbard and *Nash* contended that a woman is not dowa

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ole of an equity of redemption; and that the intesta e had only an instantaneous seisin, and so his widow was not entitled to dower. They cited *Popkin* v. *Bumstead*, 8 Mass. R. 491; *Gibson* v. *Crehore*, 3 Pick. 475; [2nd ed. 481, note 1;] *Snow* v. *Stevens*, 15 Mass. R. 278; [Rand's ed. 280, note *a*;] *Clark* v. *Munroe*, 14 Mass. R. 351.

Whiting and *Bishop*, *contrà*, cited *Titus* v. *Neilson*, 5 Johns. Ch. R. 542. Stearns on Real Actions, 381, 382.

Per Curiam. It is clear that after the mortgage to Pyncheon, the intestate was seised as to all persons except the mortgagee; and it is settled that a widow is dowable of an equity of redemption.[1] The first mortgage was discharged, leaving in force the mortgage to S. Griswold, in which the widow had released her dower. This release was co-extensive with the mortgage; it extended no further; and consequently the right of dower continued, subject only to that incumbrance.[2]

Sept 10th

Judgment according to verdict.

JOHN CHATFIELD, Petitioner, &c. *versus* HEZEKIAH LATHROP.

Where a witness on whose testimony a verdict was found, denied on the voir dire that he had any interest in the case, newly discovered evidence of his being interested was admitted upon an application for a new trial; and it being further proved, by similar evidence of declarations of the witness and of the prevailing party, that the witness had testified untruly, a new trial was granted.

THIS was a petition for a new trial. Chatfield sued Lathrop to recover 63 dollars, which he had paid him about the 5th of March, 1826. The verdict, which was in favor of Lathrop, turned upon the testimony of one Piper, who testified, that he was present on the 5th of March, when money passed from Chatfield to Lathrop, but that the sum of 63 dollars, which Chatfield contended he had paid to Lathrop at that time,

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[1] See *Cass* v. *Martin*, 6 N. Hampsh. R. 25; *Gibson* v. *Crehore*, 5 Pick. (2nd ed.) 149, note 1; *Southerin* v. *Mendum*, 5 N. Hampsh. R. 431, 432. But see *Jackson* v. *Dewitt*, 6 Cowen, 316.

[2] See Revised Stat. *c.* 60, § 2; 4 Kent's Comm. (3d ed.) 44.

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was not so paid. Chatfield objected to Piper on account of his interest, and the witness being put on the *voir dire*, the objection was overruled. The ground of the present application was, that Chatfield had discovered evidence since the trial which would exclude Piper's testimony ; and if he should fail in this, that he had discovered evidence since the trial, which would prove by the declarations of Lathrop and Piper, that he did pay the sum of 63 dollars to Lathrop, as above mentioned

Whiting and *Dwight*, for the petitioner.

C. A. Dewey, for the respondent.

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Per Curiam. On the part of the respondent it is said, that as the witness was put upon the *voir dire*, the evidence now produced to show that he was interested is inadmissible. If this evidence had been known at the time of the trial, it would be so ; but as the case proceeds upon the ground of newly discovered evidence, we think it ought to be received. Still it might be questioned whether a new trial should be granted on account of the inadmissibility of the witness.[1] The evidence however goes further. It shows that the defendant and Piper both admitted that the plaintiff had paid the 63 dollars. The testimony of the new witnesses would contradict Piper, and if he were discredited, would support the action. It is then said that this evidence is cumulative ; but we do not consider it to be so. Cumulative evidence is such as tends to support the same fact which was before attempted to be proved.[2] Here the new evidence is to show that Piper confessed he testified what was untrue. This was not in controversy at the trial. Justice requires that a new trial should be granted.[3]

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[1] The discovery of new witnesses to impeach the testimony of a witness examined on the former trial, is not sufficient ground to grant a new trial. *Dickenson* v. *Blake*, 7 Bro. P. C 177; *Halsey* v. *Watson*, 1 Caines's R. 24; *Rowley* v. *Kinney*, 14 Johns. R. 186. See *Keen* v. *Sprague*, 3 Greenl. 77; *Haskell* v. *Beckett*, 3 Greenl. 92. But it is held a good cause for granting a new trial, that one of the witnesses of the party in whose favor the verdict is, has been convicted of perjury in the cause. *Great Falls Manuf. Co.* v. *Mathes*, 7 N. Hampsh. R. 574; *Morrell* v. *Kimball*, 1 Greenl. 322.

[2] See *People* v. *Superior Court of New York*, 10 Wendell, 285

[3] See *Gardner* v. *Mitchell*, *ante*, 116, notes 1, 2.

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WILLIAM LEAVENWORTH *versus* EBENEZER POPE.

The principal debtor is not liable for the costs of an action brought by a surety against a co-surety for contribution, and consequently is not disqualified to be a witness in such action.

THIS was an action brought by a surety against his co-surety for contribution. The principal debtor was offered by the defendant, as a witness to prove an arrangement and settlement between the sureties, but was objected to by the plaintiff on the ground of interest. *Putnam* J. sustained the objection, considering the principal to be interested to the extent of the costs which might be recovered by the plaintiff in case he prevailed. If the witness was improperly excluded, a new trial was to be granted. *Sept.* 1828.

Whiting and *Bishop*, for the defendant, cited *Ilderton* v. *Atkinson*, 7 T. R. 480 ; *Birt* v. *Kershaw*, 2 East, 458.

Porter and *Briggs*, for the plaintiff, cited *Townend* v. *Downing*, 14 East, 565 ; *French* v. *Foulstone*, 5 Burr. 2727 · *Hayden* v. *Cabot*, 17 Mass. R. 169.

Per Curiam. If the principal was not liable for costs, the objection to his competency fails ; and we are all of opinion that he was not so liable. He has no concern in the controversies of sureties between themselves.

New trial granted.

JOSEPH D. LYNCH *versus* NOAH ROSSETER.

Where in an action of trespass *qu. cl. fr.* brought before a justice of the peace, the defendant pleads only the general issue, he cannot give evidence that the plaintiff was not in possession of the land, for that brings the title in question.

THIS was an action of trespass *quare clausum fregit* brought originally before a justice of the peace. The general issue only was pleaded. Judgment was rendered for the defendant, and the plaintiff appealed. Upon the trial in the Court of

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Lynch v. Rosseter

Common Pleas the plaintiff proved the alleged trespass, and the defendant offered evidence to prove that at the time of the trespass the plaintiff was not in possession of the land. *Strong* J. rejected this evidence, on the ground that it brought in question the title to real estate, and so was precluded by *St.* 1783, *c.* 42, § 2, [See Revised Stat. *c.* 85, § 1,] and this Court were of the same opinion. The judgment of the court below was accordingly affirmed.

Dwight and *Kellogg*, for the plaintiff.

Hubbard and *Bishop*, for the defendant, cited *Taylor* v *Townsend*, 8 Mass. R. 411; *Chambers* v. *Donaldson*, 11 East, 65.

Deodatus C. Whitwood *versus* Amos Kellogg.

Where a mortgagee, upon being requested by the mortgager to state an account of the money due on the mortgage, renders such an account without any unreasonable delay, giving all the information in his power, he will not be liable to the costs of a bill to redeem, under *St.* 1821, *c.* 85, § 1, although some items in the account should prove erroneous: nor, if the bill is sustained, will he be entitled to recover costs.

Sept. 10*th*

This was a bill in equity, under *St.* 1821, *c.* 85, § 1, to redeem land in the possession of the defendant as assignee of the mortgagee. Upon a demand made to state an account of the rents and profits, the defendant rendered one forthwith, in which he charged about 34 dollars for disbursements; of which sum an auditor appointed in the suit disallowed about 5 dollars.

C. A. Dewey and *Bishop*, for the plaintiff, claimed costs, on the ground that the defendant had "unreasonably refused or neglected to render a *just* and *true* account."

But the *Court* said it was not the intention of the statute, that any little errors in the account rendered should subject the defendant to costs, where he shows a willingness to give all the information in his power. The refusal to render a true account should be such as would show an intention to embarrass the other party.

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Whiting, for the defendant, likewise claimed costs; but the Court observed that the statute in question does not give costs to the defendant, and that in the present case he was not the prevailing party and so not entitled under the general statute provision respecting costs.

Redemption decreed.[1]

[1] See Revised Stat. c. 107, § 18, 19.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN, AND HAMPDEN, SEPTEMBER TERM 1828, AT NORTHAMPTON.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

RUFUS SAXTON, Appellant from a Decree of the Judge of Probate, *versus* WILLIAM CHAMBERLAIN

An administrator may be examined on oath upon interrogatories before the judge of probate, with regard to the time when he received money of the intestate's estate, and the use which he has made of it, in order to ascertain whether he is liable to pay interest upon it.

A settlement of an account in the Probate Court by an administrator, in which he does not charge himself with interest on moneys received by him, does not preclude a subsequent inquiry as to the propriety of charging him with interest, if the question of interest was not a subject of examination when the account was passed.

If when the account was settled, the Probate Court inquired into the liability to pay interest and decided against it, the settlement, unless obtained by fraud, is conclusive against the liability.

423 Where an administrator several months after settling an account, presented a petition to the judge of probate for a commission on his disbursements, which was allowed, it was held that this was opening the account, and that omissions in it, such as not charging himself with interest for which he was accountable, might be corrected.

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RUFUS SAXTON, administrator on the estate of William Barnard, deceased, presented an account of administration to the Probate Court of the county of Franklin in May, 1826, which, after due notice, &c. was allowed by the judge in June. In this account he did not charge himself with any interest. In October the administrator presented a petition to the judge to be allowed a commission on his disbursements; and after due notice, &c. the prayer of the petition was granted in the succeeding November.

In the same month of October, W. Chamberlain and S. Allen, creditors of the deceased, presented a petition to the judge, that Saxton, the administrator, should be required to account for interest on the money in his hands belonging to the estate; and in November it was decreed, that the administrator should be examined upon oath touching the time when he received the money and the use which he had made of it. From this decree the administrator appealed for the following reasons, *viz.* — There is not any statute or law of the Commonwealth by force of which an administrator is answerable for interest on any money in his hands, and it has, until very recently, been held by the Supreme Court to be questionable, whether administrators were liable to such examination; and the case of *Stearns et al.* v. *Brown*, 1 Pick. 530, where it was held that they were bound to answer, was very different from this case. There the administrators were called upon to answer interrogatories touching the use made of money in their hands only during the pendency of the appeal in the case. Here the administrator exhibited his account of administration at a Court of Probate in May, 1826, including the whole amount of interest received by him, and the case was continued to a Probate Court in June then following, and an order of notice was issued and published in a public newspaper agreeably to the order, that all persons interested might appear, &c. at which court one of the petitioners was present and examined the account and made no objection to the same, nor was any objection made by any one, and the administrator then and there made oath that the account by him exhibited was true. Now if the creditors have a right to make the inquiry of the administrator respecting the use of the money in

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his hands, they ought to have appeared at the Court of Probate, according to the notice, and have put the interrogatories before the oath above mentioned was tendered to the administrator, and by neglecting to do so they have waived their right to make such examination.

The case was argued in writing.

Ashmun, for the appellant, contended that interest, being a mere incident to the principal, could not be claimed after the account was settled with regard to the principal; that the matter had been already passed on and was directly involved in the decree of the judge of probate on the account; that the decree, being *res judicata*, was conclusive as to the subject matter of it to all intents and purposes. He cited *Moses* v. *M^c Ferlan*, 2 Burr. 1009; *Homer* v. *Fish*, 1 Pick. 435.

Wells, *contrà*. The petition of Saxton in October was a prayer to correct the account passed in June, and opened that account. The account being thus opened for his benefit, it is opened for other purposes, and he certainly cannot object to have it corrected where it is to his disadvantage. An executor or administrator is liable for interest on money in his hands, if he has received any interest from the loan of it, if he has used it in his business, if he has unnecessarily delayed accounting for and paying it over, and even if he has deposited it, if the deposit has been a benefit to him. *Mumford* v. *Murray*, 6 Johns. Ch. R. 1; *Brown* v. *Ricketts*, 4 Johns. Ch. R. 303; *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. R. 510; *Manning* v. *Manning*, ibid. 535; *Shiefflin* v. *Stewart*, ibid. 620; *Ratcliffe* v. *Graves*, 1 Vern. 196; *Lee* v. *Lee*, 2 Vern. 548; *Newton* v. *Bennett*, 1 Bro. C. C. 359; *Perkins* v. *Baynton*, ibid. 375; *Treves* v. *Townshend*, ibid. 384; *Franklin* v. *Frith*, 3 Bro. C. C. 433; 4 Dow's Parl. Cas. 131; *Stearns* v. *Brown*, 1 Pick. 530; *Wyman* v. *Hubbard*, 13 Mass. R. 232. Omissions and errors in an administrator's account may be always supplied and corrected in a subsequent account. *Weeks* v. *Gibbs*, 9 Mass. R. 74; *Stearns* v. *Stearns*, 1 Pick 157, 159, 164; *Wyman* v. *Hubbard*, 13 Mass. R. 235.

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The administrator may be made to add to his account credits not contained in it. *Boston* v. *Boylston*, 4 Mass. R. 318. An administrator may be examined on interrogatories upon

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oath respecting any property which has come to his hands, or the use that he has made of money collected by him, while it was in his hands. *Stearns* v. *Brown*, 1 Pick. 530.

PUTNAM J. delivered the opinion of the Court. The objections of the counsel for the appellant cannot prevail. The object of the appellee is to compel a discovery under the oath of the administrator, of the facts which may tend to prove his liability to pay interest upon any money held by him during the time of his administration. It may happen that the facts which may be disclosed would not support any charge of interest. We have decided in *Stearns* v. *Brown et al.* 1 Pick. 530, that the administrator may be compelled to answer upon oath touching the use he has made of the money in his hands, and we see no good reason for overruling that opinion.[1]

If the account of administration has not been settled and closed, it seems wholly unimportant whether a charge to which the administrator is justly liable, be classed among the incidental or principal matters.

The main objection which has been presented is, that this matter has already been passed in judgment at the Probate Court. It either has or it may have been there considered and disallowed. It is said to be *res judicata*, and involved in the settlement of the previous account in the Probate Court. If that were made to appear, we should not disturb the account or open it in the manner proposed. But all that can be ascertained from the inspection of that account is, that there is no charge for interest contained in it. It is answered however, that the reason for the omission may be the refusal of the judge of probate to allow such a charge upon the application of the 126
appellee, and so it is insisted that this matter may have been heard and tried and decided in the proper tribunal. Now that argument would apply just as well to any other charge which should be proposed to be added to the account, which had been omitted to be claimed in a former account. *Non constat* upon the face of the account, or in the proceedings in the Probate Court, but that the judge has refused to allow it. It may have been the subject of examination, and it may have

[1] See *Griswold* v. *Chandler*, 5 N. Hampsh. R. 497; Revised Stat. *c.* 67 § 7; *Pope* v. *Jackson*, 11 Pick. 118; *Higbee* v. *Bacon*, 7 Pick. 14.

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been rejected. But we think that this argument proves too much, and would exclude all claims which were in existence, but which were by accident or mistake omitted to be presented. It will not do to say that no investigation shall be had concerning such charges, because, for any thing which appears upon the face of the proceedings, they may have been heard and rejected. If that were the truth of the case, it can be proved, and if proved, it would be conclusive.[1] For we consider all matters within the jurisdiction of the Probate Court and settled there, to be conclusive between the parties, and not to be disturbed unless upon the ground of fraud; which will vitiate all proceedings in that as well as in any other court. It was upon this principle that this Court proceeded in Hapgood's case at Worcester. An issue was found by the jury in that case, upon the point of fraud alleged to have been practised in the settlement of the account in the Probate Office.

Now the appellant cannot say with truth, that this account of administration is closed. He has opened it himself to correct a mistake which he made, by which he omitted to charge the estate with something with which it ought to be charged. It being opened, it seems to us that the appellee must be permitted to show that the administrator has omitted to charge himself with something with which he ought to be charged.

The allegation is, that this is new matter upon which the judge has not decided, and which has not been presented Whether it be so or not, may be a subject of subsequent inquiry and proof. If it were heard and rejected, it would follow that the remedy for the aggrieved party would have
427 been by appeal. But if it shall appear that it is new matter, as the account is now opened, we see no good reason why it should not be examined.[1]

We think the administrator must answer upon his oath to the interrogatories proposed by the appellee; and that the cause should be remitted to the Court of Probate, for further proceedings there to be had upon the discovery which the administrator is to make.

[1] See *Standish* v. *Parker*, 2 Pick. (2nd ed.) 22, note 3.

[1] See Revised Stat. c. 67, § 10.

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The Trustees of AMHERST ACADEMY *versus* JONATHAN COWLS.

Where a subscription to a charitable fund was made after the incorporation of the body who were its trustees, and afterwards a promissory note was given, purporting to be for value received, payable to the same party, and referring expressly to the subscription and the purposes of it as the consideration of the note, and those purposes were in the process of execution, the note was held to be founded on a sufficient consideration and to be binding on the promisor.

The trustees of an academy incorporated "to promote morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies," were held to be capable of procuring subscriptions and taking promissory notes to constitute a fund for the purpose of founding an institution "for the classical or academical and collegiate education of indigent young men, with the sole view to the christian ministry," to be incorporated with the academy.

An assignment by the trustees of the academy of such promissory notes, to a college incorporated distinct from the academy but by its charter authorized to receive and required to appropriate the fund in question according to the will of the donors, was held valid to transfer the notes.

Held also, that an action upon a negotiable note given as above and assigned by deed to the college but not indorsed, was rightly brought in the name of the trustees of the academy.

ASSUMPSIT on the following promissory note. "July 14th, 1819. For value received, I, the subscriber, of Amherst, &c. promise to pay to the trustees of Amherst academy or their order, on or before the 23d of May, 1820, one hundred dollars, with annual interest from and after the 23d of May, 1819, being the amount of my subscription to the charitable fund established in Amherst for the classical education of indigent pious young men, and in pursuance of my 428
covenants and engagements as expressed in the constitution of said fund by me subscribed, and dated the 23d of May, 1818. Jonathan Cowls."

The defendant pleaded the general issue, and offered in evidence the original subscription paper. The constitution referred to was for the purpose of founding an institution for the instruction of youth in all the branches of literature and science usually taught in colleges, to be located in Amherst and incorporated with the academy in that place. The 2d article was as follows: — "In order to effect the benevolent object aforesaid, we whose names are hereunto

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subscribed, severally and solemnly promise to pay to the trustees of Amherst academy for the time being, or to their successors in office, the sums annexed to our respective names, for the purpose of raising a permanent fund of the amount of at least 50,000 dollars, as the basis of a fund for the proposed institution, the interest of which is to be appropriated in manner hereinafter provided, to the increasing said fund, and for the classical or academical and collegiate education of indigent young men of promising talents and hopeful piety, who may desire such an education, with the sole view to the christian ministry &c.; provided that in case the sums subscribed to this instrument in the course of one year from the date hereof shall not amount to the full sum of 50,000 dollars, then the whole, or any part thereof, shall be void, according to the will of any subscriber, he giving three months' notice &c., and within three months after the expiration of the year." The 5th article provided, that until the contemplated institution should be incorporated and organized, the property of the fund and the management thereof should be vested in the board of trustees of Amherst academy; so however as to be in conformity to the provisions of this constitution; and that upon the incorporation and organization of the institution in question, the trustees of the academy should without loss of time transfer to the board of trustees of the institution the whole of the property of the fund, together with the titles and evidences of the same.

429 The defendant further offered in evidence a deed of assignment from the trustees of Amherst academy to the trustees of Amherst college, transferring the note in suit.

The *St.* 1824, *c.* 84, establishing a college in Amherst, in § 5, authorizes the trustees "to receive all the real estate, goods, chattels, choses in action, and property of every description whatever, which has, heretofore, been given, &c., or engaged to be given, paid or devised to the trustees of Amherst academy, with the intent and for the purpose of establishing and maintaining a classical or collegiate institution in said town; and that all the said funds &c. shall be faithfully and for ever used and appropriated according

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to the will of the donors." In § 7 it is provided, that if the trustees of Amherst academy shall not within eight months, by a good deed or deeds, assign to the trustees of Amherst college all the property specified in § 5, the act shall be void.

The St. 1815, c. 102, establishes an academy in Amherst, for the purpose of promoting morality, piety, and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies, or as shall be directed by the trustees."

It was contended by the defendant, that this action could not be maintained: — 1. Because there was no sufficient legal consideration for the promise: — 2. Because the trustees of Amherst academy could not become the payees of a note given for the purposes expressed in the note and subscription paper: — 3. Because the note was transferred to the trustees of Amherst college, and the suit should have been brought in their name.

For the purposes of the trial, all these points were ruled against the defendant, and the jury were instructed to find a verdict for the plaintiffs. A verdict was returned accordingly, subject to the opinion of the whole Court.

Sept. 24th, 1827.

C. A. Dewey, for the defendant. The promise was *nudum pactum*. To make a valid contract there must be a good or valuable consideration, and if a man, without any moving consideration, other than good will, promises to give or pay a sum of money, this promise cannot be enforced by law. A consideration is no less necessary to an agreement in writing, than to one by parol. *Rann* v. *Hughes*, 7 T. R. 350, note; *Burnet* v. *Bisco*, 4 Johns. R. 235; 1 Saund. 211, note 2. The want of consideration may be alleged against a promissory note, as between the original parties, although the note purports to be for value received. *Pearson* v. *Pearson*, 7 Johns. R. 26; *Phœnix Ins. Co.* v. *Fiquet*, ibid. 383; *Schoonmaker* v. *Roosa*, 17 Johns. R. 304; *Fink* v. *Cox*, 18 Johns. R. 148; *Fowler* v. *Shearer*, 7 Mass. R. 14.

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The case of *Boutell* v. *Cowdin*, 9 Mass. R. 254, is directly in point. That was an action on a promissory note

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given to cancel a subscription made in aid of a fund for the support of a minister of the gospel, and the note was held invalid for want of a consideration. See also *Phillips Limerick Academy* v. *Davis*, 11 Mass. R. 113.

These cases would seem to be decisive of the present one; but it will be contended that *Bowers* v. *Hurd*, 10 Mass. R. 429 and *Fisher* v. *Ellis*, 3 Pick. 323, contain a doctrine somewhat different. The correctness of some of the principles stated in *Bowers* v. *Hurd*, has been doubted, as suggested in 3 Pick. 208. *Fisher* v. *Ellis* was decided upon the peculiar circumstances of the case. The Court say that the defendant's testator acknowledged a consideration, *viz.* "that he had borrowed the money," and that he would not be allowed to contradict his admission; but they do not say, that if the words had been "for value received," the defendant could not deny the validity of the note. That the general principles for which we contend were not decided against us in *Fisher* v. *Ellis*, is apparent from the case of *Mills* v. *Wyman*, 3 Pick. 208, which was determined subsequently. There the principle is distinctly stated, that in case of a promise in writing made freely and without any mistake, if nothing was paid for it, the law leaves the execution of it to the conscience of the promisor.

The cases of *Bowers* v. *Hurd* and *Fisher* v. *Ellis*, were against the administrator, and not against the original party who made the promise. It was apparent that the maker of
431 the note would never have resisted the payment of it, and the Court were therefore not disposed to sustain the defence against the wishes of the original parties. The present case is against the maker of the note, who has never confirmed it, and who may, when an attempt at law is made to enforce a gratuitous promise, object to it as *nudum pactum*.

The defendant contends further, that upon the evidence in this case, no greater liability attaches to him than arose from his original subscription, before giving the note, and if so, he clearly is not legally held. 11 Mass. R. 113.

The defendant also objects, that the trustees of Amherst academy being incorporated for a specific purpose, could not become payees of the note, the object of it being foreign to

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the purposes of their incorporation. *First Parish in Sutton* v. *Cole*, 3 Pick. 240.

It is further urged, that this note has been transferred to the trustees of Amherst college, and that the action should have been in their name. We do not mean that there is an indorsement of the note in the ordinary way, but we say that by *St.* 1824, *c.* 84, § 5, 7, this transfer took effect, the trustees of Amherst academy having before the commencement of this action made an assignment by deed of all their notes, bonds and choses in action to the trustees of Amherst college. The statute authorized this mode of transfer in the present case, and it is equally effectual as though it were by indorsement. The same authority was exercised by the legislature in the act incorporating Williams college, (*St.* 1793, *c.* 15,) and the additional act, (*St.* 1795, *c.* 72,) where clearly the power is given, of suing on notes not indorsed. If an indorsement is necessary to enable the trustees of the college to maintain an action, they having an interest in the note can obtain that indorsement.

Bates, for the plaintiffs.

The opinion of the Court was read at a subsequent term, as drawn up by

PARKER C. J. The first objection to the verdict is, that no sufficient legal consideration for the note declared on was proved. As a consideration is expressly admitted in the note itself, the defendant, to avoid payment, must prove that, contrary to his admission, no value or consideration was in fact received. It seems that an actual benefit to the promisor, or an actual loss or disadvantage to the promisee, will be a sufficient consideration to uphold a promise deliberately made. Whether the consideration received is equal in value to the sum promised to be paid, seems not to be material to the validity of a note, though in some cases it is held, that where there is a mistake as to the value for which the promise is made or a partial failure of the consideration, the jury may on trial give a less sum than is purported to be due on the face of the contract. And this has been recognised as law with us. But generally the parties are to be considered as competent judges of the value of the consideration on which they make

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their contracts. The objection in this case however goes to the whole of the consideration, so that the note is either *nudum pactum* in the whole, or is valid for the whole amount.

The original consideration of the note appears in the note itself, the promisor saying, it "being the amount of my subscription to the charitable fund established in said Amherst for the classical education of indigent pious young men, and in pursuance of my covenants and engagements as expressed in the constitution of said fund by me subscribed, and dated the 23d day of May, 1818." The note in suit is dated July 14th, 1819; more than a year after the date of the subscription. The defendant then, besides admitting generally a consideration under the terms "value received," specially admits that he was previously bound by a covenant and engagement voluntarily and deliberately made, with the intent and purpose of contributing to a fund which was to be appropriated to one of the most interesting and useful objects to which a man can apply the means with which Providence has blessed him, and yet he now attempts to avoid this re-iterated contract on the ground that there was no legal consideration for it. The law undoubtedly allows men, who have inconsiderately undertaken to bind themselves in contracts for which they have received no equivalent, to avoid such engagements by showing that they
433 received nothing for them, or that the party with whom such contract was made would lose nothing by the non-performance of it. And this rule of law is frequently taken advantage of by those, who, without any pretence of mistake or inconsideration, have made their written promises. All that the Court can do to discourage such dishonorable conduct, is to require strict and unquestionable evidence that the case comes within the rule, the burden of proof, where a consideration is expressly admitted, being altogether on the defendant.

Was there a consideration for this note when it was given? In one sense there was not; that is, the promisor had received nothing at the time from the payees, which was of any pecuniary value. But it is quite sufficient to create a consideration, that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable either at law or equity to perform, unless the

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promisor should be able to show when sued, that the payee had refused, or was unable, or had unreasonably neglected to perform the engagement on his part; in which cases a defence might be raised on the ground of a failure of the consideration. The defence is not put upon that ground, and so it must be presumed that the corporate body to whom the promise is made, has applied its funds to the purposes for which they were raised, or is ready and willing to do it whenever the different contributors to it shall have performed their engagements. In a court of equity of general jurisdiction, they could be compelled to discharge their duty. Without such a court they would be subjected to a loss of their charter, by refusal or neglect; for without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by com mon law would cause a forfeiture of their charters. It certainly then would seem that every contributor to the funds of a corporation authorized by law to receive moneys and apply them to the improvement, in most essential points, of the community to which he belongs, has his recompense in his share of the public good resulting from them; and if by means of his contribution, or his solemn promise to pay, the body 434
to whom he has pledged his word should encounter expense, become under legal obligations, or otherwise pursue the intent and purpose of the legislature in granting them the charter, this is a sufficient legal consideration to support such a promise. In this respect the principles of common honesty cannot be at variance with the law of the land. It cannot be maintained that objects so important shall be frustrated, and that the agents appointed by the government to execute them shall be embarrassed and injured by the right of individuals to withdraw their contributions or refuse to comply with their promises, after the execution or during the progress of the work which they themselves set in motion. No case from the English or American reports has been cited to warrant so unjust a principle. Those which have been relied upon to sustain the defence in this case will be shown to have been whol-

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ly misapprehended, or at least to fall far short of the principle attempted here to be supported.

The doctrine contended for, that there must be a consideration for a written promise, cannot be disputed, and it seems to be the general result of the authorities, that although such consideration is expressly admitted, it may be denied and proved not to have existed, in a suit between the original parties to the promise. Intimations to the contrary of this were given in the case of *Bowers* v. *Hurd*, 10 Mass. R. 427; but though the facts of that case will, upon other principles, justify the decision, the intimations in regard to the conclusiveness of the admission of "value received" are not supported in their full extent by the authorities.

The first case in our books analogous to the present, is that of *Boutell* v. *Cowdin*, 9 Mass. R. 254. Unfortunately, the opinion of the Court in this case is stated in a much more loose manner than is usual, when the subject matter is of general import. The action was brought on a special written promise for value received to pay Boutell and others, deacons of the church of which the Rev. Titus T. Barton was pastor, in
435 their corporate capacity, or their successors in office, the sum of one hundred dollars, for the benefit of the church aforesaid, &c. By the facts agreed it appeared, that the church spoken of in the promise consisted of the major part of the members of the church attached to the congregational society in Fitchburg, the minority having, by an ecclesiastical council, been set off into a separate church, which was attached to a majority of the parish. The majority of the church, with the minority of the parish, continued together and settled the Rev. Mr. Barton as their pastor. It was proposed to raise a fund for his support by voluntary subscription, and a subscription paper was drawn up for that purpose, dated May 10th, 1804, to which the defendant's intestate subscribed 100 dollars. Afterwards the subscribers generally gave notes for the amount of their subscription, and on the 26th of February, 1805, the note in question was given by the intestate for his subscription. The third point of defence was stated as an inference from the other two, *viz.* that this was a mere voluntary undertaking of the intestate without consideration. No benefit could ac

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crue to him from the payment of the money, *since the plaintiffs could not be compelled to pay it over*, or *appropriate it* to the purpose intended, if they received it. Nor is there any consideration of damage to the plaintiffs, since they advanced nothing, and if they did not receive the money, they could never be called upon to pay it over. The whole opinion of the Court is summed up in these few words: — "that three objections had been made to the verdict in this case. First, that the promise declared on was not binding, as being made without a valuable consideration. Second, that the deacons of the church were not, by the statute of 1785, made a corporation for the purpose of receiving and managing a fund established for the support of a minister. Third, that in this case the plaintiffs had not shown themselves to be the deacons of a church duly organized. On this last objection the Court gave no opinion. But they considered the two former ones as well founded, and on both grounds they set aside the verdict."

It is quite sufficient to observe on this case, that if the second objection was sustained, to wit, that the deacons had 436
no authority by law to receive and manage funds for the maintenance of a minister, the *first* of necessity must prevail; for the very purpose for which the promise was made failed, the party to whom it was made having no authority to dispose of the money to the use for which it was promised. It is not therefore decided in that case, that a written promise made to a body legally existing and capable of applying the money, when paid, to the use intended, and compellable by law so to apply it after it has been received, is *nudum pactum*; but only, that as those to whom the promise was made, were not capable in law of using the money for the purpose for which it was given, there was no consideration, and therefore the promise was void. We have been more particular in examining this case, because from the brief and unsatisfactory manner in which the opinion of the Court is stated, inferences have frequently been drawn from it, which we think the case does not warrant.

The next case which occurs in our books, in which this subject has been treated, is the *Trustees of Phillips Limerick*

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Academy v. *Davis*, 11 Mass. R. 113. [See Rand's ed. 119, note *a*.] The action was assumpsit for the sum of 100 dollars, and the evidence to support it was a subscription paper signed by the defendant and others, wherein they agree to pay or cause to be paid, the several sums subscribed, in money or materials, for erecting an academy in Limerick. It was agreed that an academy had been built according to the terms of the subscription, and that the amount of his subscription had been demanded of the defendant. The subscription was made July 1st, 1808. The plaintiffs were incorporated in November following, and the act provided that all lands, moneys or other property already subscribed, or which may hereafter be given, assigned or transferred to the said trustees for the use of the academy, shall be received and held by them, and their successors, in trust for the academy.

The objections to the recovery were, that the plaintiffs were not parties to the promise; that there was no mutuality, no consideration; and the Court sustained these objections. It is stated in the opinion of Chief Justice *Sewall*, that

437 "it is a promise to give, connected with a similar promise by others to give to the same appropriation and purpose; but these promises are not mutual among the subscribers. At the most it was a donation to come into operation at the will of each subscriber, which *has not been confirmed by any act of the party charged.*"

It is further observed, that "the general principle is, that voluntary agreements and promises, however reasonable the expectation from them, of gifts or disbursements even to public uses, when made without consideration, are not to be enforced as contracts; but where the promise is made in consequence of any thing yielded to the disadvantage of the promisee, and so where it is a *proposal upon a consideration afterwards performed* or gained to the promisor, this may import a sufficient consideration." It is in the conclusion stated, that if the subscriber be named or descriptively included in the grant of incorporation, and has been concerned in the subsequent proceedings and had the advantages of a member of the corporation, the corporation may be entitled to

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the benefit of his subscription, and he may be answerable upon an implied promise.

This case differs from the one before us in several particulars. The action was upon a subscription paper in common form, made before the existence of the party who brought the suit upon it, and there was no subsequent act recognising or confirming the defendant's promise. In the present case there was a subscription; but afterwards, and when the corporation was in being and activity, a promissory note, referring to the former transactions and acknowledging a value for the promise, was given; and it is upon this note that the present action is brought. The cases are entirely different. Surely the plaintiffs might confide in a promise thus deliberately made; and the confession of a consideration, after a knowledge of all the circumstances, ought not to be avoided but by proof of incapacity on the part of the promisees to apply the money as was intended, or an absolute refusal or neglect on their part to do it.

The next case touching this subject is that of the *Trustees of Farmington Academy* v. *Allen*, 14 Mass. R. 172. It was *assumpsit* to recover the amount of a subscription towards the funds of that academy. The subscription paper was drawn up and signed before an act of incorporation passed the legislature. The money was payable, by the terms of the subscription, to any persons who should be appointed trustees by the legislature. The trustees subsequently so appointed were the plaintiffs. As the case stood upon the count on the subscription paper, it was not to be distinguished from the case before cited of *Limerick Academy* v. *Davis*; but the money counts were added, and it being agreed, that after the incorporation, the trustees appointed a committee to erect a building, and the defendant, upon being called on for a part of his subscription, delivered on account of it some shingles to be used on the building, the Court held this to be a sufficient recognition of the promise, and the plaintiffs recovered to the extent of the subscription. It was said by the Court, that the case was brought within the principle of *Homes et al.* v. *Dana*, 12 Mass. R. 192.

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The case of the *Trustees of Bridgewater Academy* v *Gil-*

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Amherst Academy v. Cowls.

bert, 2 Pick. 579, stands upon the subscription alone, and is therefore like the case of *Limerick Academy* v. *Davis*, in most respects.

On this review of the cases which have occurred within this Commonwealth, analogous in any degree to the case before us, we do not find that it has ever been decided, that where there are proper parties to the contract, and the promisee is capable in law of carrying into effect the purpose for which the promise is made, and is in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration. On the contrary, in all the cases cited except the first, it is decided expressly, that promises of this nature, if inefficient at first for want of a payee, or because at the time there was no actual consideration, but one in contemplation only, it is a legal basis for a subsequent promise, and that the execution of or beginning to execute the trust for which the fund is raised, forms a sufficient consideration for such subsequent promise.

We have then in the present case a subscription to a charitable fund made after the incorporation of the body
439 who were its trustees, and more than a year after that a promissory note, made for value received, payable to the same party, referring expressly to the subscription and the purposes of it as the consideration of the note. And we find that those purposes are in process of execution, the funds being needed for and applied to the faithful execution of the trust. We cannot doubt that the note is valid, and that the defence is maintainable neither in law nor in conscience. The party bound admits by his contract the consideration to be good and valuable, and he has shown nothing to authorize us to deny the justice or legality of the construction which he chose to put on his own antecedent engagement.

The court of New York, in the case of the *First Religious Society in Whitestown* v. *Stone*, 7 Johns. R. 112, sustained the same principle. [1]

[1] See *Williams College* v. *Danforth*, 12 Pick. 541; *Trustees of the Church &c in Hanson* v. *Stetson*, 5 Pick (2nd ed.) 509, note 1.

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Another objection to the plaintiffs recovering is, that the corporation which they represent is not authorized by the terms of its charter to hold a fund for the purpose for which the money was raised by subscription; but on inspection of the act of incorporation, we think this objection cannot prevail. The purposes of the incorporation, as described in *St.* 1815, *c.* 102, § 1, are, "to promote morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies." By the second section the corporation is authorized to apply property already given, or which shall be thereafter given, &c. to the above purposes, and the only limitation is, that the income from the funds shall not exceed 5000 dollars. The education of pious indigent young men, for which the subscription was raised, is clearly within the meaning of the legislature in this statute.

In regard to the other objection, that the plaintiffs have assigned the note in question to the trustees of the college, we do not see any legal force in it. This transfer is authorized by statute, upon the condition that the funds shall be appropriated by the college to the same purposes as the academy were held to apply them to. It is converting the academy into a college, in the same place, and bound to 440
execute the same purposes, and probably having better means of executing them. The deed of transfer under the sanction of the legislature operates as an assignment in equity, if not at law. The note is payable to order, but that does not prevent the assignee from suing in the name of the original promisee.[1] It was advantageous for the defendant to be so sued, as he was thereby let in to all such defence, either in law or equity, as might avail him if the note had not been assigned.

[1] See Bayley on Bills, (2nd Am. ed.) 338.

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ANSON KIMBERLY *et al. versus* THEODORE ELY
WILLIAM ELY *versus* The Same.
NEHEMIAH ALLEN *versus* The Same.

Where an insolvent debtor is discharged from his debts by virtue of an unconstitutional State bankrupt law, a creditor will not be considered to have assented to or ratified the discharge, notwithstanding he may have proved his debt under the commission and received a dividend, or have acted as one of the assignees.

In an action by such creditor, any dividend received by him under the commission will be considered as a payment, *pro tanto*, of his debt.

ASSUMPSIT on certain promissory notes made by the defendant to the plaintiffs respectively, in the State of New York, previous to the 3d of April, 1811.

In the first case (*Kimberly et al.* v. *Ely*) the defendant pleaded in bar a discharge, as an insolvent debtor, under a statute of insolvency passed April 3, 1811, by the legislature of New York.

This statute provides, that any insolvent debtor imprisoned on any civil process under the authority of that State, or who should be prosecuted in any court thereof, for debt or on contract express or implied, may petition the recorder of the city of New York, Albany or Hudson, that his estate may be assigned for the benefit of his creditors, and upon an exhibition of his debts, and of the property belonging to him and of debts due to him, may be allowed to assign the
441 same as aforesaid, and thereupon may by the said recorder be for ever discharged from any debts due from him before that time, or any liabilities incurred or afterwards accruing on any pre-existing contract.

The plea sets forth the various requisitions of the statute, and avers a performance by the defendant of every thing required to entitle him to the discharge, and makes profert of the certificate of discharge by the recorder of New York. It also states that the plaintiffs were transacting business in New York under the firm of Kimberly, Brace & Company, at the time of making the note, that the same became due on the 1st of May, 1810, and that the plaintiffs proved the debt under the commission and received a dividend

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To this plea there was a general demurrer and joinder.

The pleadings in the other cases were nearly similar. The plea in the case of Ely against Ely alleges that the contract was to be performed in New York, and that it was proved and allowed under the commission; but it does not aver that the plaintiff was an inhabitant of New York, nor that he received a dividend. In Allen *et al.* against Ely the plea states that the debt became payable after the passing of the statute, that the plaintiffs were inhabitants of New York, that they received a dividend, and that Allen was one of the assignees.

Lathrop, *Morris* and *Ashmun* were of counsel for the plaintiffs; *G. Bliss* and *G. Bliss*, junior, for the defendant. The argument was made with more particular reference to the case of Kimberly *et al.* against Ely.

Ashmun. In the case of *Sturgis* v. *Crowninshield*, 4 Wheat. 122, this very statute was held to be inoperative and void as to debts existing prior to it; and the circumstances of proving a debt and receiving a dividend under the commission of insolvency cannot prejudice the plaintiffs' rights; these acts of theirs cannot confirm or make operative a statute which is unconstitutional and void; nor are they estopped by any supposed assent; the statute is general and cannot be void as to the whole community and yet bind an individual. Co. Litt. 295; 1 Lill. Abr. 295; *Beaumont's Case*, 9 Co. Rep. 141; *Shadwick* v. *Phillips*, 3 Caines's R. 129; *Marbury* v. *Madison*, 1 Cranch, 137; *Holden* v. *James*, 11 Mass. R. 396. The case stands, therefore, as if no such statute existed, and as if the recorder of New York had undertaken to give a discharge without authority of law; the proceedings are wholly nugatory.

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In the next place, there is no averment in the plea, that the plaintiffs knew a discharge to have been intended; and they are not bound to know it, but on the contrary had a right to presume such a provision to be void. For aught that appears, the plaintiffs had proved their debt and received a dividend before the discharge was granted, as they had a right to do; and yet the defendant contends that they have ratified this discharge.

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But further; the plaintiffs were not bound by such ratification, as it was made without consideration; this is a universal principle in all codes. *Crawford* v. *Millspaugh*, 13 Johns. R. 87; *M'Lemore* v. *Powell*, 12 Wheat. 557. Even payment of a part, with an express acknowledgment that it is for the whole, if not under seal, is not a discharge; and this is the utmost that can be said in the present case. *Richards* v. *Bartlet*, 1 Leon. 19; *Pinnel's Case*, 5 Co. Rep 117; *Cumber* v. *Wane*, 1 Str. 426; *Adams* v. *Tapling*, 4 Mod. 88; *Fitch* v. *Sutton*, 5 East, 230; *Steinman* v. *Magnus*, 11 East, 390. This is the law of Massachusetts and of New York, which must govern the present case. *Harrison* v. *Close*, 2 Johns. R. 448; *Watkinson* v. *Inglesby*, 5 Johns. R. 386, 391; *Dederick* v. *Leman*, 9 Johns. R. 333.

We contend further, that there was no express ratification; and, if any implied one, then it ought to be at least as strong as in the case of an infant's contract. *Thompson* v. *Lay*, 4 Pick. 48, and the cases there cited as to infants. If an implied ratification can be here set up, it will be impossible to draw the line between what shall and what shall not be one; it is for the defendant to show how the limits can be drawn; as in *Laidlaw* v. *Organ*, 2 Wheat. 195.

Again; if the defence is available, it is not properly pleaded; if it is an accord and satisfaction, or payment, it should be so stated. *Johnson* v. *Carter*, 16 Mass. R. 445; *Monnington* v. *William*, 1 Ventr. 109, *per Twisden* J.; *Lade*
443 v. *Baker*, 2 Ventr. 149; *Baker* v. *Lade*, 3 Lev. 291; *Challoner* v. *Davies*, 1 Ld. Raym. 403; *Fletcher* v. *Peck*, 6 Cranch, 125.

To constitute a valid ratification, it must be made by a party with a full knowledge of his rights. *Messonnier* v. *Kauman*, 3 Johns. Ch. R. 21, and *Gray* v. *Murray*, ibid. 188; and on such an issue the parties might go to a jury. The case of *Hampshire* v. *Franklin*, 16 Mass. R. 76, comes the nearest to the present case; but the decision there was affected by an accidental omission in the act under which the action was brought; and the act was moreover a private one and assented to by the party, and there was also a consideration.

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The case of *Ogden* v. *Saunders*, 12 Wheat. 213, does not, in any part, interfere with the claim of the plaintiffs; and see *Shaw* v. *Robbins*, in note, at the end of that case, *p.* 369. Had the plea alleged, that the contract was made after the statute, still it would have been bad in not averring the plaintiff to be an inhabitant of New York. In the present case it is alleged that the plaintiffs were "transacting business" in New York. The law now in question is entitled to the less respect, as it has already been overthrown by the Supreme Court of the United States; and in the State of New York it has been condemned by one of their own judges, Chancellor *Kent*. *Hicks* v. *Hotchkiss*, 7 Johns. Ch. R. 304.

G. Bliss, senior, for the defendant.

The present case is not governed by any decision of the Supreme Court of the United States; and it must therefore be decided by the principles adopted by our own Court. It is not easy, indeed, to say how far the courts of the union have gone; the case of *Sturgis* v. *Crowninshield*, 4 Wheat. 122, is considered by Mr. Justice *Johnson*, in *Ogden* v. *Saunders*, 12 Wheat. 272, as a compromise. There being, then, no bankrupt law of the United States, we contend —

1. That the State of New York had a right to pass the statute in question, so far as it does not impair the obligation of contracts. *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213, 357; *Blanchard* v. *Russell*, 13 Mass. R. 12, 16.

2. The New York statute here specially pleaded, directs 441
the effects of an insolvent to be distributed to pay his debts; all who were creditors at its passing might elect to receive a dividend under it and relinquish further claims; and future creditors must come in or be wholly barred. Such a law does not impair the obligation of contracts. Courts will support the statutes of a State, if it can by any sound construction be done. *Barnes* v. *First Parish in Falmouth*, 6 Mass. R. 417; *Portland Bank* v. *Apthorp*, 12 Mass. R. 252. There is nothing inconsistent with the spirit of this law so to consider it; and as to contracts made after the law, there can be no doubt in regard to citizens of the State. It is a general principle, that the acts of a State are binding on its citizens. *Ogden* v.

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Saunders, 12 Wheat. 357 ; *Touteng* v. *Hubbard*, 3 Bos. & Pul. 291 ; *Atkinson* v. *Ritchie*, 10 East, 534 ; *Mennett* v. *Bonham*, 15 East, 477, and *Flindt* v. *Scott*, ibid. 525 ; *Simeon* v. *Bazett*, 2 Maule & Selw. 94 ; *Power* v. *Whitmore*, 4 Maule & Selw. 141 ; *Consequa* v. *Fanning*, 3 Johns. Ch. R. 598 ; *Hicks* v. *Hotchkiss*, 7 Johns. Ch. R. 308.

For the construction of the terms "impairing the obligation of a contract," we refer to the case of *Ogden* v. *Saunders* already cited. The statute was held to be constitutional as to certain contracts, and the reverse as to others ; and we submit, that the ground of difference was, that the creditor's right to compel performance was (by a majority of the court) not considered to be destroyed in the former, but was in the latter. The right of one, who became a creditor before the law, to take a dividend, and the effect of so doing, were not examined in that case. All creditors have such a right, and nothing in the law prohibits it ; and though a contract is to be executed according to its meaning under existing laws, yet if the creditor consents to vary from it, the obligation is not impaired. If in the present case, the substance of these proceedings had been inserted into the contract now sued, the creditor could not complain. The case of *Mason* v. *Haile*, 12 Wheat. 370, 380, goes much farther ; it declares a *special* insolvent act to be a lawful discharge. The maxims of law,
445 *volenti non fit injuria*, *consensus tollit errorem*, and *omnis ratihabitio retrotrahitur et mandato æquiparatur*, are applicable ; the plaintiffs are bound by their own assent. The want of such assent is carefully noticed by the judges in the decisions against the insolvent laws ; *M'Menomy* v. *Murray*, 3 Johns Ch. R. 435 ; *Ogden* v. *Saunders*, 12 Wheat. 262, 263, 272, 281, 285, 358, 364, 366, 342 ; *Oakley* v. *Bank of Columbia*, 4 Wheat. 235 ; *Baker* v. *Wheaton*, 5 Mass. R. 509 ; *Watson* v. *Bourne*, 10 Mass. R. 337.

Again ; the plaintiffs have made an election of their remedy, by coming in under the commission of insolvency ; and in many cases, where a man has two remedies, by pursuing one he loses the other. Bacon's Abr. (ed. Gwillim,) Appendix, *tit. Election*, *A*, 4 Hen. & Munf. 123 ; Co. Litt. 144 *b*. The proving of a debt under a commission is an election

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and as to the principle of election, generally, see the cases of *Read* v. *Sowerby*, 3 Maule & Selw. 78; *Whistler* v. *Webster*, 2 Ves. jun. 370; *Wilson* v. *Lord Townshend*, ibid. 695; *Philpotts* v *Reed*, 1 Brod. & Bingh. 294; *Holmes* v. *Remsen*, 20 Johns. R. 229, and 4 Johns. Ch. R. 460. There are many instances, by our laws, where a man is obliged to make his election; as, in bankruptcy, when he has a pledge or mortgage; in claims against a deceased insolvent, when he has either; so, if he has a pawn, he cannot hold it and attach at the same time. Cooke's Bankr. Law, 119; *Amory* v. *Francis*, 16 Mass. R. 308; Com. Dig. *tit. Bankr.* 34. There are indeed, both in England and in this State, adjudged cases, where a bankrupt not having a discharge, his creditors are not bound; but they depend on the express necessity of a discharge by the words of the statutes. *Lummus* v. *Fairfield*, 5 Mass. R. 248; *Whitney* v. *Crafts*, 10 Mass. R. 23. In the case at bar, the defendant was actually discharged; the plaintiffs have ratified the proceedings, and they are bound at law as well as in equity. *Aylett* v. *Harford*, 2 W. Black. 1317. If a creditor elect a new security of his principal debtor, he discharges the surety; and so, upon a voluntary composition, a creditor taking other security cannot enforce it. The decisions on this point extend to cases of insolvency as well as of bankruptcy. *Lynch* v. *Reynolds*, 16 Johns. R. 41; 446
Cockshott v. *Bennett*, 2 T. R. 763; *Jackson* v. *Lomas*, 4 T. R. 166; *Sumner* v. *Brady*, 1 H. Black. 647; *Leicester* v. *Rose*, 4 East, 372; *Jackson* v. *Davison*, 4 Barn. & Ald. 691.

The statute in question, and the proceedings under it, are not void but voidable; and the plaintiffs have ratified them. This distinction is well established. Co. Litt. 171 *b*; *Zouch* v. *Parsons*, 3 Burr. 1794; Co. Litt. 214; *Goodright* v. *Strahan*, Cowp. 201. If, then, the plaintiffs themselves, who had the exclusive right to object, have given their assent, this removes the only valid objection to the proceedings. If the plaintiffs' action were brought in New York, it would be barred; and the same judgment ought to be given in this court as there; the law of the place of contract decides its nature, validity, construction and effect; as is settled in the standard work of

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Huberus, *De Conflictu Leg. lib.* i, *tit.* 3, cited in 3 Dallas, 370. This is clearly the law in New York; it has been uniformly acted upon in this Court. *Mather* v. *Bush*, 16 Johns. R. 250; *Pearsall* v. *Dwight*, 2 Mass. R. 84; *Baker* v. *Wheaton*, 5 Mass. R. 509; *Greenwood* v. *Curtis* (a very strong case, in illustration of the principle), 6 Mass. R. 358; *Blanchard* v. *Russell*, 13 Mass. R. 1; *Cambridge* v *Lexington*, 1 Pick. 506 In England, the rule is well established. *Conway* v. *Gray*, 10 East, 536, 539; *Touteng* v. *Hubbard*, 3 Bos. & Pul. 291; *Mennett* v. *Bonham*, 15 East, 477; *Flindt* v. *Scott*, ibid. 525; *Simeon* v. *Bazett*, 2 Maule & Selw. 94; *Power* v. *Whitmore*, 4 Maule & Selw. 141. As a consequence of this principle, what is a good discharge of, or defence against a contract there, is the same everywhere; *Lodge* v. *Phelps*, 1 Johns. Cas. 139; *Bird* v. *Pierpont*, 1 Johns. R. 119; *Smith* v. *Smith*, 2 Johns. R. 235; *Ruggles* v. *Keeler*, 3 Johns R. 263; *Thompson* v. *Ketcham*, 4 Johns. R. 285, and 8 Johns. R. 189; *Sherrill* v. *Hopkins*, 1 Cowen, 103; *Van Raugh* v. *Van Arsdaln*, 3 Caines's R. 154; *Hull* v. *Blake*, 13 Mass. R. 153; *Prentiss* v. *Savage*, ibid. 20; *Tappan* v. *Poor*, 15 Mass. R. 419; *Hicks* v. *Hotchkiss*, 7 Johns. Ch. R. 297; *Mather* v. *Bush*, 16 Johns. R. 238. The same doctrine, we have supposed, is held by the
447 courts of the United States; *Searight* v. *Calbraith*, 4 Dallas, 325; *Harrison* v. *Sterry*, 5 Cranch, 289; *Slacum* v. *Pomery*, 6 Cranch, 221; *Lanusse* v. *Barker*, 3 Wheat. 101, 146.

There seems, it is true, to be some uncertainty where the line is to be drawn between the cases relating to the remedy (which are governed by the *lex fori*) and those relating to the contracts, which are regulated by *lex loci contractûs*. But though the rule cannot in all cases be accurately applied, it cannot reach the case at bar. The denial or discharge of all remedy cannot with any propriety be called a regulation of it, unless the poet's principles can be applied, —

Utor permisso;
demo unum, demo etiam unum.

The remarks in the closing opinion of the court in *Ogden* v. *Saunders*, as delivered by *Johnson* J., would lead us again to apprehend the same evils from the conflicting decisions

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of different States, which were felt before the adoption of the federal constitution, if the laws of New York cannot operate on a contract made in that State and to be performed there, beyond the jurisdiction of the State courts; the removal of a party to the distance of one rod would completely change the liability. It was thought to be a great acquisition when the federal constitution brought into existence a controlling power, which did away local distinctions; but with the greatest deference, it seems to us impossible to maintain the ground assumed in deciding the particular case of *Ogden* v. *Saunders* without overturning first principles. The cases cited do not, as we think, warrant the position there taken by the learned judge; that of *Harrison* v. *Sterry*, 5 Cranch, 361, has but a remote relation to the subject; and the cases decided by this Court are extended very much beyond their legitimate import; as, in *Baker* v. *Wheaton*, 5 Mass. R. 509, the principle of which, as laid down by Chief Justice *Parsons*, we agree to; he says, if the promisee had not been a citizen of Rhode Island, the decision might have been different; but he does not assert that it would, if the contract had been made there; and in *Watson* v. *Bourne*, 10 Mass. R. 337, from the observation of the Court it would seem, that the debtor could not have 448
availed himself of a discharge even in Rhode Island. In these remarks we are fully warranted by the observations of the Court in *Blanchard* v. *Russell*, 13 Mass. R. 10, 11. The English cases are numerous. Cooke's Bankr. Law, 515; *Smith* v. *Buchanan*, 1 East, 4; *Potter* v. *Brown*, 5 East, 124; *Male* v. *Roberts*, 3 Esp. R. 163; *Anon.* 1 Bro Ch. R. 376. To the American cases already cited may be added *Thompson* v. *Ketcham*, 8 Johns. R. 189; *Vermont State Bank* v. *Porter*, 5 Day, 316; *Bartsch* v. *Atwater*, 1 Connect. R. 409. The judges of the United States, on their circuits, have held the same doctrine. *Warder* v. *Arell*, 2 Washington, 282, 295; *Babcock* v. *Weston*, 1 Gallison, 168; *Van Reimsdyk* v. *Kane*, ibid. 371; *Green* v. *Sarmiento*, 1 Peters's Circ. Court R. 74; and the cases in the Supreme Court of the United States are not less decisive; as, *Harrison* v. *Sterry*, 5 Cranch, 289; *Slacum* v *Pomery*,

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6 Cranch, 221; *Clarke's Ex'ors* v. *Van Riemsdyk*, 9 Cranch, 153; *Lanusse* v. *Barker*, 3 Wheat. 101, 146; *M'Millan* v. *M'Neill*, 4 Wheat. 209; *Bank of Columbia* v. *Oakley*, ibid. 235; *Sebree* v. *Dorr*, 9 Wheat. 558.

The case of *Ogden* v. *Saunders* is to be held as binding only in those cases which are precisely similar. The case at bar differs from that in two very important features; the plaintiffs are citizens of New York, doing business there, and they have come in under the commission and sanctioned the proceedings. The case of *Potter* v. *Brown*, 5 East, 124, is in point and somewhat like the present. The only cases we have found, upon the effect of receiving a dividend, are one in Connecticut (3 Connect. R. 304), decided in 1820, soon after that of *Sturgis* v. *Crowninshield*; and a majority of the court considered the case to be governed by that decision; and one more recent, in New York, *Bryar* v. *Willcocks*, in which no intimation is given that the plea was not a valid one. 3 Cowen, 159, and the cases cited; *Field* v. *Howland*, 17 Johns. R. 85; *Ex parte Freeman*, 4 Ves. 836; *Grosvenor Ex parte*, 14 Ves. 587.

Two objections made to this plea require a particular answer: 1. That it states the receipt of a less sum, after the
449 debt became due, and therefore cannot be a legal bar Our answer is, that such receipt may be insufficient in assumpsit; but our case is not one of accord and satisfaction merely, nor so pleaded; the law of New York is first stated, then the proceedings up to the discharge, and, what is a very material fact, the assignment of *all the debtor's effects*; and also the plaintiffs' assent to the proceedings, proving their debt and taking a dividend. The case of *Steinman* v. *Magnus*, 11 East, 390, relied upon by the plaintiffs, is in our favor; the agreement there, though not under seal, was held to be binding, the party having "lured in" the surety and other creditors, to relinquish their further demands. See also *Read* v. *Sowerby*, 3 Maule & Selw. 78; *Watkinson* v. *Inglesby*, 5 Johns. R. 386; *Heathcote* v. *Crookshanks*, 2 T. R. 24; *Cooling* v. *Noyes*, 6 T. R. 264; particularly the remarks of *Buller* J. and *Kenyon* C. J. in the two last cases. We believe that no case can be found to

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govern the case at bar; those cited for the plaintiffs may be easily distinguished. The whole of that doctrine rests upon *Pinnel's Case*, 5 Co. R. 117, and Co. Litt. 212 *b*, which was debt on bond, and payment of a less sum *before* the day was held a good plea; but it is there said, that payment of a less sum *at* the day is no bar, though the delivery of a specific thing in satisfaction is good. See *Adams* v. *Tapling*, 4 Mod. 88; Com. Dig. *Accord*, *A*, where no distinction is made between covenant and assumpsit, in accord. In *Fitch* v. *Sutton*, 5 East, 230, there was an accord, but no satisfaction; and the same thing, in *Cumber* v. *Wane*, 1 Str. 426, and *Harrison* v. *Close*, 2 Johns. R. 448. The cases of *Johnston* v. *Brannan*, 5 Johns. R. 268, — *Seymour* v. *Minturn*, 17 Johns. R. 169, — *Wilson* v. *Finney*, 13 Johns. R. 353, — *Dederick* v. *Leman*, 9 Johns. R. 333, — *Buddicum* v. *Kirk*, 3 Cranch, 293, — *Kaye* v. *Waghorne*, 1 Taunt. 428, — are to be understood as limited to their peculiar circumstances. This is apparent, from what has been already observed; and from two other cases, *Boyd* v. *Hitchcock*, 20 Johns. R. 76, and *Sheehy* v. *Mandeville*, 6 Cranch, 253. We conclude, therefore, from the cases, that no technical rule prevents the parties from carrying their agreement into effect, as it was intended that the plaintiffs should be 450
bound by their election.

To the second objection made to the form of the plea we answer, first, that it is good on general demurrer. *Heard* v. *Baskerville*, Hob. 233; *Slade* v. *Drake*, ibid. 301; *Bowdell* v. *Parsons*, 10 East, 359; *Buckley* v. *Kenyon*, ibid. 139; *St.* 1784, *c.* 29; *St.* 27 *Eliz. c.* 5; *St.* 4 *Anne*, *c.* 16; *Bolton* v. *Bp. of Carlisle*, 2 H. Black. 261; *Collins* v. *Gibbs*, 2 Burr. 899; *Burland* v. *Tyler*, 2 Ld. Raym. 1391; *White* v. *Clever*, ibid. 1416; *Burgess* v. *Brazier*, 1 Str. 594; 1 Salk. 219; *Boyce* v. *Whitaker*, 1 Doug. 94, and *Jones* v *Barkley*, ibid. 684. Our plea is therefore good, in substance; and further, it is not defective in form. The body of it is transcribed from that in *Sturgis* v. *Crowninshield*, which has gone through the ordeal of judicial examination. The rule, that things should be pleaded according to their legal operation (Bac. Abr. *Pleas*, *I* 7), prohibits pleading an instrument or

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any act in a way in which it cannot by law operate, though the parties may have treated it as such. *Johnson* v. *Carter*, 16 Mass. R. 443; *Challoner* v. *Davies*, 1 Ld. Raym. 403; *Baker* v. *Lade*, 3 Lev. 291, and 4 Mod. 149, and 2 Ventr 149; *Moore* v. *Earl of Plymouth*, 3 Barn. & Ald. 66. The case of *Monnington* v. *William*, cited in 2 Saund. 97 *b*, note, is much relied on to show that the present plea is bad. But see the report of the same case in T. Raym. 200; and it is to be noted, that this was before the statute of Anne; and in *Lade* v. *Baker*, cited in the note to Saunders, an amendment had been made, which did not meet the case, and it was adjudged bad. The remarks of Serjeant Williams, who is himself no small authority, are to be taken in connexion with what he says at *p.* 96, note 1, upon the word "grant." Lord *Coke* says, Co. Litt. 301 *b*, that the party has a right to apply the words *dedi et concessi* as he will: and *Comyn* professedly accords with him; *Pleader*, *C* 37. But if the rule as to deeds were even as strict as contended for, it ought not to govern transactions *in pais*; at any rate this is but a defect in form, and good on general demurrer. As to the constitutional objection, we will only add, that we know a ratification will not make the law a different one; but when the
451 only objection is, that it is void as to these creditors, because it impairs the obligation of their contract, we submit, that it is a sufficient answer, that they, having taken the benefit of these proceedings, cannot now object to them.

In respect to the case of *Allen et al.* v. *Ely*, the same and stronger objections lie against the plaintiffs' recovering. The plaintiffs were citizens of New York, and one of them acted as assignee and certified the defendant's assignment and conformity to the statute; the debt accrued after the law passed and upon these pleadings, it is to be taken that the contract was made when the debt accrued, and not before. In *Blanchard* v. *Russell*, above cited, the Court say, that as the account was liquidated after the act, the discharge was valid.

In the remaining case now before the Court, *Ely* v. *Ely*, the circumstance of the plaintiff's living in Connecticut and not having taken his dividend, can make no important difference; his debt was to be governed by the law of New York,

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and the acts which he did under the commission sufficiently prove his assent and will bind him.

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The opinion of the Court was drawn up by

April term 1828

PARKER C. J. [After stating the pleadings in the first case.] There is no occasion to consider the general question of the validity of the statute under which the defendant claims to be discharged from this and all his other debts, nor to examine the character of this statute, which has been justly denounced by the highest judicial authorities of the State in which it was passed, as unwise, impolitic and unjust, and in truth as being a legislative violation of the most obvious and essential principles established and sanctioned by all civilized people for the security of property and the maintenance of honesty and good faith in the community.

The statute is wholly nugatory and void in relation to the contract sought to be enforced by this action, it being a palpable violation of the constitution of the United States, which expressly prohibits any State from enacting any law which shall impair the force and obligation of contracts. This Court has decided in the case of *Blanchard* v. *Russell*, 13 Mass. R. 1, that an insolvent law of any State can have no operation upon a pre-existing contract, and this principle has not been questioned by the Supreme Court of the United States, or any one judge thereof, in any of the cases which have come under the cognizance of that court.[1]

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The only question then, which has required consideration in this case, is, whether the plaintiffs by their acts, *viz.* coming in under the commission, proving their debts and receiving a dividend, great or small, (for the amount is not stated in the plea,) have given validity to a discharge otherwise void, that is, by assent to or ratification of the doings of the recorder under this void statute.

It has been argued that the proceedings are not void but voidable, and therefore may become valid by the consent or ratification of the party whose interests are affected. But an act of the legislature which it has no constitutional right or power to pass, is a nullity, and all proceedings under it are

[1] See *Pitkin* v. *Thompson*, 13 Pick. 64; *Blake* v. *Williams*, *ante*, 306. 2 Kent's Comm. (3d ed.) 392, 393.

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void. The acts of individual citizens can give no force or effect to them. Besides, in the case presented by the plea, the proceedings of the plaintiffs ought to be considered as compulsory rather than voluntary, and therefore cannot amount to a ratification, if a void act *could* be ratified. The act was clothed with all the usual legislative sanctions. Citizens would not be prompt to suspect that the sovereign guardian authority of their country had abused or violated their trust. They see the property of their debtor sequestrated, and are threatened with the loss of the whole unless they take measures to preserve a part. They are under a moral duress, and ought not to be held to have aided in raising the storm, merely because they try to save something from the wreck.

By the statute then considered in force in New York all the property of the debtor was sequestered, so that it could not in any way be reached by writ or execution. The debtor was to be discharged from all his debts on his own application *without the consent of any of his creditors.* The presumption is always in favor of legislative acts clothed with the forms prescribed by the constitution. The creditor sees that the property is all to be distributed; and according to the tenor and terms
453 of the law, unless he takes a share he can never get any thing. He does not know that the act is void, and ignorance under such circumstances will relieve him from the effect of acts which might otherwise be evidence of assent, for he is ignorant only of what the legislature itself must charitably be presumed to have been ignorant, *viz.* that in passing the act they were acting wholly without authority.

It is argued that every citizen or subject is presumed to assent to the laws of his own government, in regard to the subjects of other governments. This is a just and necessary principle, but it does not apply to the case, for here there was no law to assent to, and it is not the right of a citizen of another government which is in question, but the controversy is between two subjects of the same government; or if the plaintiffs were not citizens of New York, then this principle of assent does not apply at all.

It is said that by a decision of this Court, it was held that a citizen of Rhode Island was bound by the laws of that State,

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when a citizen of another State might not be so bound. True; but the Court is speaking of laws, and not of unauthorized acts; and the question was only of such laws as had force within, but not without the territory where they were made. The right of the legislature of Rhode Island to make such a law was not drawn in question; it was made long before the contract to which in that case it was applied. The case in 10 Mass. R. 337, recognises no other principle. But it is said the plaintiffs have elected to take their dividend. An election under such circumstances, it has been shown, is not binding. Nothing short of a discharge given by the plaintiffs could annihilate their claim, and indeed it seems very clear that by the general laws of New York, unless there were a discharge under seal amounting to a release, payment of less than the whole debt cannot be pleaded or given in evidence as a satisfaction and discharge of a contract.

In England one who proves his debt under a commission of bankruptcy may, on petition to the lord chancellor, be allowed to withdraw his claim and proceed at law. And this may be done even by one who is chosen assignee. *Ex parte Williamson*, 1 Atk. 83; *Ex parte Lindsey*, ibid. 220; *Ex parte Ward*, ibid. 153; *Ex parte Salkeld*, 1 P. Wms. 562. Probably not so after receiving his dividend;[1] but these are cases where there is a valid commission of bankruptcy. The case before us is where it is invalid. A creditor has not the means of knowing what was the evidence on which the party was declared a bankrupt, and by proving his debt he at most gives credit to the petitioning creditor, and the commissioners, that the former has not sued out a commission, nor the latter declared the party bankrupt, without proper grounds; and it is not reasonable that he should be put to the dilemma of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed. 2 Stark. Ev. 33; *Rankin* v. *Horner*, 16 East, 191; *Collins* v. *Forbes*, 3 T. R. 322. A commission of bankruptcy in England is *involuntary* against the bankrupt. It is a suit by one creditor for the benefit of all, and the property is forcibly

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[1] See 2 Kent's Comm. (3d ed.) 393, note *a*.

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taken for the purpose of distribution. In the case before us the whole proceedings are at the instigation of the debtor. His assignment is *voluntary*, and his purpose is to defeat his creditors of their claims. There may then be good reason in that country for inferring assent from facts which will not admit of the same inference here. We think for these reasons the facts set forth in the plea are no bar to the action. The defendant may have the benefit under the general issue of any dividends which may have been received by the plaintiffs; they will be construed to be payment *pro tanto*.

We see nothing to distinguish the several cases or to take either of them out of the principle of this decision. The contracts were all made before the passing of the statute, and whether the debts became payable before or afterwards can make no difference. Whether a dividend has been received or not, makes no difference; nor that the plaintiff in one of the cases was chosen and acted as assignee. For the reasons before given, no assent can be inferred from any acts done under a statute which is altogether void and inoperative.

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455 ALANSON WALLIS *versus* PEARLY TRUESDELL *et al.*

In trespass against an officer for attaching property of the plaintiff in an action against him which was not sustained, it was *held* that he was not estopped to show that the property belonged to him, although at the time of the attachment he declared it belonged to a stranger, the plaintiff having acquired no advantage and the officer having sustained no damage by such declaration.

Where a defendant, whose property had been attached, made an agreement with the plaintiff that the defendant should take the property, and if an adjustment of the suit should not be made, should return it and the plaintiff might then sell or dispose of it as he chose, and apply the proceeds to his claim against the defendant, and the property was delivered to the defendant and returned to the plaintiff and afterwards sold by the officer, by auction, upon the mesne process, the defendant forbidding the sale; it was *held*, that the defendant had a right to revoke the license to sell.

Where an officer sells chattels attached on mesne process, without pursuing the provisions of *St.* 1822, *c.* 93, and the defendant prevails in the suit, the officer becomes a trespasser *ab initio*, and is liable to an action without any previous demand on him for the chattels.

TRESPASS *de bonis asportatis*. The defendants pleaded jointly not guilty.

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At the trial, before *Wilde* J., it appeared, that the property taken was attached by one of the defendants, a deputy-sheriff, upon a suit by Truesdell against Wallis, in which Wallis prevailed. The plaintiff (Wallis) had stated on several occasions to Truesdell and to other persons, that no part of the property was owned by him. Some time after the attachment an agreement was made, at the request of the plaintiff, between him and Truesdell, that Truesdell should permit him to take the property into his possession upon his furnishing a good receipter therefor, and that if an adjustment of the suit should not be made in two or three weeks, he should then return it to Truesdell, and Truesdell might then sell it or dispose of it as he chose, and apply the proceeds on his claim against the plaintiff. The property was delivered to the plaintiff and afterwards returned to Truesdell, pursuant to the agreement, and was subsequently sold by the officer, by auction, upon the mesne process. The plaintiff was present at the sale and forbade it, saying the property belonged to one Lendal Wallis. There was other evidence tending to show that the property belonged to 456
the plaintiff, notwithstanding his declarations, and that at the time of making the declarations he was in embarrassed circumstances.

It was contended for the defendants, that this action could not be maintained, because no demand of the property had been made by the plaintiff; that the plaintiff's declarations were conclusive evidence to prove that the property was not his; and that the agreement respecting the sale of the property being made upon good consideration, was binding upon him, and a sufficient objection to this action. The jury however were instructed, that the declarations were strong evidence against the plaintiff, but not conclusive, and that if from the whole evidence they should be satisfied that the property belonged to him, and that his declarations were made for the purpose of preventing his creditors from attaching it, they might find a verdict in his favor. They were further instructed, that a demand was not necessary, as Truesdell did not prevail in his action, and it would have been the duty of the officer to return the prop-

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erty in a reasonable time after the determination of the action, if it had not been sold; that the sale was unauthorized and made the defendants trespassers *ab initio*, for although the plaintiff at one time assented to the sale, yet he had a right to revoke his assent, and if he did revoke it before the sale, the officer was not authorized to proceed without pursuing the directions of the statute in such case made and provided.

To these instructions the defendants excepted; and if they were incorrect, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

Sept. 18*th.* *G. Bliss* junior and *Chapman*, for the defendants, cited, as to the license to sell, *Tillotson* v. *Preston*, 7 Johns. R. 285; *Winter* v. *Brockwell*, 8 East, 309; *Thomas* v. *Sorrell*, Vaugh. 351; Vin. Abr. *License A*, *pl.* 2, and *E*, cites 5 H. 7, and 1 Ma. Dyer, 92; — as to the necessity of a demand, *Gates* v. *Lonusbury*, 20 Johns. R. 429; — and as to the plaintiff's declarations, 2 Stark. Ev. 28, [5th Am. ed. 18.]

Bates, *Dewey* and *Ashmun*, *contrà*, cited on the last point, *Hall* v. *Huse*, 10 Mass. R. 39.

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Sept. 26*th.* WILDE J. delivered the opinion of the Court. We are all of opinion that the instructions to the jury were correct, and that the plaintiff is entitled to judgment on the verdict. As to the question of property, the jury were instructed that the declarations made by the plaintiff were strong evidence against him, but were not conclusive; this was certainly proper, unless, as the defendants contend, they operated by way of estoppel, which cannot be maintained. If these declarations had been acted on by the other party, and thereby the plaintiff had acquired some advantages, or the defendants had sustained damages, it would have been otherwise.[1] But the case shows that the admissions of the plaintiff, although made with a view to influence the conduct of the defendants, did not in fact influence them, and that they did not act on these admissions. On the contrary, the defendants claimed the goods in question as the property of the plaintiff, and they were sold as his property,

[1] See *Tufts* v. *Hayes*, 5 N. Hampsh. R. 452.

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so that if the plaintiff were estopped by his admissions, the defendants on the same ground would be estopped to deny the plaintiff's property; there would therefore, on that supposition, be estoppel against estoppel, and the question would be left open to the admission of other evidence. We are however of opinion, that there was no estoppel on either side. It was altogether a question of evidence for the jury, and their verdict must be conclusive.

On the other point, it has been objected that the license was irrevocable, because it was founded on a sufficient consideration, and ought therefore to be considered as a valid contract.[2] But we do not view it in that light; there was no sufficient consideration to support a contract. The agreement between Truesdell and the plaintiff was of no benefit to the plaintiff, nor was it any damage to Truesdell. He had no legal right to the property attached, nor had he any control over it. And if the agreement had been made between the plaintiff and the officer, still it would be *nudum pactum*; for it was the officer's duty to accept a good receipt for the property; and if not, he has not been injured thereby, nor has the plaintiff received any benefit. We think therefore the license was revocable; and having been revoked before the sale, the sale was unauthorized; and thereby 458
the defendants became trespassers *ab initio*.

Judgment according to verdict.

[2] See *Mansfield* v *Mansfield*, 6 Connect. R 559.

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William Walker, Appellant, &c. *versus* The Administrators of Elihu Lyman.

A judge of probate has authority, within eighteen months from the granting of a commission of insolvency, to extend the time for creditors to present their claims, notwithstanding the report of the commissioners may have been made and accepted.

Where a judge of probate refuses the petition of a creditor praying for such an extension, an appeal will lie.

Where an attorney, having collected money for a client who lived out of the Commonwealth, died, and the client, upon hearing of the death, used due diligence to have his claim presented against the estate, but found that a commission of insolvency had been granted and a report of the commissioners had been made and accepted, but no decree of distribution had been passed, and eighteen months had not elapsed from the granting of the commission, it was *held* that the commission ought to be re-opened, in order that he might have an opportunity of laying his claim before the commissioners.

Elihu Lyman, of Enfield in the county of Hampshire, died in February, 1826. On the 11th of April following, his estate was represented to the judge of probate to be insolvent, and thereupon a commission of insolvency was granted and ten months (afterwards extended to thirteen months) were allowed to the commissioners to receive, examine and report on the claims of creditors. On the second Tuesday of August, 1827, which was after the report of the commissioners had been accepted by the judge of probate, but before any order of distribution had been passed, a petition was presented to the judge by William Walker of Cooperstown, in the State of New York, alleging that in 1820 he remitted to Lyman, who was an attorney at law, three notes signed by one Scott, for collection; that the notes were for the sum of 340 dollars, payable in three and four years from April, 1818; that Lyman, in 1821, paid him about 250 dollars on account of the notes; that he heard nothing further upon the subject of the note last due, until he was told of
459 Lyman's death, when he ascertained that the note had been paid, that Lyman's estate had been represented insolvent, commissioners had been appointed, and a report had been made on the 17th of May, 1827, whereby he was barred from presenting his claim. The petition concluded with a

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prayer that the commission might be re-opened, and a day be given to the petitioner to present his claim to the commissioners. The judge of probate, thinking that there was not sufficient reason for a further extension of the time allowed o creditors to exhibit their claims, decreed that the petition could not be granted. From this decree the petitioner appealed; — 1. Because, living at the distance of 160 miles from the place where the commissioners sat, he never heard of their session: — 2. Because, when he heard that the commission had closed, he made immediate application to the judge of probate to have it extended: — and 3. Because, having a just claim against the estate of Lyman, he would lose the same unless the commission were extended.

The petition was supported by affidavit.

Doolittle, for the respondents, contended that after a return by the commissioners has been accepted and recorded and twenty days have elapsed without any appeal claimed, it is the duty of the judge of probate to order a distribution, and the creditors whose claims have been allowed are entitled to the funds in the hands of the administrator, to the extent of their claims. *St.* 1784, *c.* 2. But admitting that the judge had the power to extend the commission, it was a matter within his discretion, and so this appeal will not lie. It is true the *St.* 1817, *c.* 190, § 7, enacts that any person aggrieved at any decree of a judge of probate may appeal; but there must of necessity be some limitation of this right of appeal, as otherwise the settlement of estates would be attended with insuperable embarrassments. *Lamphear*, v. *Lamprey*, 4 Mass. R. 107; *Tappan* v. *Bruen*, 5 Mass. R. 193. The course prescribed by *St.* 1784, *c.* 2, must be strictly pursued. *Gedney* v. *Tewksbury*, 3 Mass. R. 307; *Bigelow* v. *Cambridge &c. Turnp. Corp.* 7 Mass. R. 202; *Hinsdale* v. *Larned*, 16 Mass. R. 70. The determination by the judge of probate of the time for presenting claims to the commissioners, operates like the statute of limitations upon any claim not presented within the time allowed.

Sept. 22*d.*

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Ashmun, for the petitioner, insisted that an appeal lies, in

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all cases, from a decree of a judge of probate; that as a distribution had not been ordered, there was no reason, in substantial justice, for not extending the commission; St. 1816, c. 62; and that the present claim was entitled to favor, inasmuch as it was made by a person living out of this State, and was for money collected by an attorney for his client.

Sept. 26th. *Per Curiam.* We think the judge of probate had the power, and that under the circumstances it was his duty, to grant this petition. It was presented a considerable time before the expiration of the eighteen months allowed by the statute for keeping open the commission. The mere return and acceptance of the report of the commissioners will not prevent the allowance of further time to creditors to present their claims. The decree is reversed, and the commission is to be extended for the term of one month. [1]

SAMUEL C. ALLEN *versus* ISAAC C. BATES *et al*

In a writ of entry the tenant claims under a deed from S. to L. of "a tract of land in South Hadley," not describing it except by reference to a deed from P. to S. of "a right to lay out" in a tract of common and undivided land in South Hadley or Granby, nine acres which M. had conveyed to P; and the tenant proves that nine acres in this tract had been surveyed to P. before he made his deed to S. *Held*, that parol evidence was admissible to show that the land so surveyed was the same with the land demanded and with that intended to be conveyed by S. to L. *Held* also, that the deed to L. was made sufficiently certain by reference.

WRIT of *entry sur disseisin*. The tenants offered in evidence, in support of their title, a deed from J. W. Smith to Z. Lyman, of "a certain tract of land lying in South Hadley, with the buildings thereon standing; further reference had at the register's office, book no. 51, page 257." At the place referred to was the record of a deed dated February
46 21, 1924, from Willis Pease to Smith, of "the right to lay out in Thomas Hovey's 2d choice in the two thousand acre division, nine acres of the common and undivided land in South Hadley or Granby in the county aforesaid, which

[1] See Revised Stat. c. 68, § 4; *Todd* v. *Darling*, 2 Fairfield, 34.

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Thomas Moody of said Granby conveyed to me by a deed dated the 28th day of Aug. A. D. 1821." The tenants produced also the Proprietors' Records of South Hadley and Granby, in which was the following entry. "Part of Thomas Hovey's second choice in the 2000 acre division laid out to Willis Pease on the mountain west of Taylor's Crack, beginning &c., nine acres, surveyed August 28th, 1821, per Gardner Preston, surveyor." The tenants also proved by a witness, that the land so laid out was the same with the demanded premises, and with that intended to be conveyed by Smith's deed. The demandant objected to the admission of these deeds as being void for uncertainty, and to the parol evidence so offered to explain and support them.

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But the *Court* held that the description in the deed from Smith to Lyman was made sufficiently certain by reference,[1] and that the parol evidence was properly admitted;[2] and judgment was given according to the verdict, which was for the tenants.

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Strong and *Ashmun*, for the demandant, cited 1 Phil. Ev. 410, 416; 3 Stark. Ev. 1000; *Doe* v. *Oxenden*, 4 Dow, 65.

Dewey, for the tenants, cited *Jackson* v. *Root*, 18 Johns. R. 63.

Amos Piper *versus* Alvarius Willard and Trustees.

Exceptions will not lie to an order of the Court of Common Pleas requiring one summoned as a trustee, to answer a particular interrogatory, such order being merely interlocutory.

In the Court of Common Pleas an interrogatory was put to the persons summoned as trustees, which they declined answering, and thereupon the Court ordered that they should answer the same. To this order they filed exceptions.

D. Wells and *Grennell* now contended that the exceptions

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[1] See *Brown* v. *Bellows*, 4 Pick. (2nd ed.) 190, note 2; *Foss* v. *Crisp*, 20 Pick. 121.

[2] See 2 Stark. Ev. (5th Am ed.) 560, 561, note 1.

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would not lie, the order being merely interlocutory; and that the supposed trustees should not have excepted until there was a final judgment charging them as trustees. *St.* 1820, *c.* 79, § 5; *Haynes* v. *Morgan*, 3 Mass. R. 208.

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The *Court* were of this opinion, observing that the cause must go on to a final judgment in the court below, the party stating his objections as it proceeds, and when there has been a final judgment, he may except to the interlocutory orders. *Purple* v. *Clark*, 5 Pick. 206.[1]

Ashmun, for the trustees, referred to *St.* 1804, *c.* 105, § 5.

Exceptions dismissed.

PARDON HAYNES *versus* NOAH WELLS *et al.*

Where overseers of the poor, upon the decease of a pauper, take possession of his effects, pursuant to *St.* 1817, *c.* 186, § 6, [St. 1837, *c.* 54,] and administration is not taken out within thirty days from his decease, they may sell so much of the property as shall be necessary to repay the expenses incurred for such pauper, notwithstanding the appointment of an administrator before the sale takes place.

In trover by the administrator of a pauper against the overseers, for articles fairly sold by auction pursuant to that statute and purchased by one of the overseers himself, the purchase was held not to be invalid.

THIS was an action of trover for several articles described in the writ, the property of one Wilcox, the plaintiff's intestate, who died in June, 1825. Letters of administration were granted to the plaintiff on the 23d of August, 1825. The intestate was a pauper, and receiving support from the defendants, who were overseers of the poor for the town of Rowe. Immediately after his death, the property sued for was taken into the custody of the defendants by virtue of *St.* 1817, *c.* 186, § 6, which provides, "that upon the death of any pauper, who, at the time of his decease, shall be actually chargeable to any town or district within this Commonwealth, the overseers of the poor of such town or district may take into their possession all the personal property belonging to such pauper. And if no administration shall be taken upon the estate of such pauper within thirty days after his decease, said

[1] See *Ely* v. *Ball*, 8 Pick. 352; *Piper* v. *Willard*, 10 Pick. 34.

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overseers may sell so much of such property, as may be necessary to repay the expenses incurred for such pauper." Soon after taking out of letters of administration by the plaintiff, the defendants, knowing that fact, sold the property in question by public auction. The sale was fairly conducted, and the property sold was no more than enough to indemnify the town for the expense incurred by them for the support of the pauper. The sale was forbidden by the plaintiff, and he attended to take possession of the property. Two of the articles sold were struck off to one of the defendants.

Howe J. of C. C. P, before whom the cause was tried, was of opinion that these facts constituted a good defence; to which opinion the plaintiff excepted.

Ashmun, in support of the exceptions, contended that the overseers had a right to sell the property after thirty days from the death of the pauper, so long as no administration was granted, but that upon administration's being taken out their authority over the property was determined. The statute is to be construed strictly, being in derogation of the common law. *Melody* v. *Reab*, 4 Mass. R. 473; *Gibson* v. *Jenney*, 15 Mass. R. 205; *Pierce* v. *Hopper*, 1 Str. 258; *Warwick* v. *White*, Bunb. 106. It gives a creditor the power to pay himself out of the property of a party deceased, making him a judge or officer in his own case. The object of the provision is to prevent the property from being wasted or lost for want of some one to take care of it; but upon the appointment of an administrator the reason ceases, and it is better that the property should then be transferred to one who is under bond and oath to account for it, than that it should remain in the hands of irresponsible persons.

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An officer cannot be a seller and purchaser at the same time; so that there is clearly a conversion of the articles which were purchased by one of the defendants. *Mills* v. *Goodsell*, 5 Connect. R. 475; *Perkins* v. *Thompson*, 3 N. Hampsh. R. 144.

D. Wells, *contrà*, cited on this last point, *Davoue* v. *Fanning*, 2 Johns. Ch. R. 252; *Minuse* v. *Cox*, 5 Johns. Ch. R. 441.

Per Curiam. We think the articles which are the subject

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of this action, were rightfully in the possession of the overseers, and as administration was not taken out within the thirty days, they had a right to sell to reimburse themselves, accounting to the administrator for the surplus.

The objection that one of the overseers was a purchaser, rests on a principle of chancery rather than of common law, that a trustee to sell shall not himself be a purchaser.[1] The object of this principle is the prevention of frauds. It has been applied in the case of trustees *eo nomine*, executors, &c., but we do not think it applicable to a case like the present. We do not know that it has ever been carried so far as to prevent a sale by a corporation and a purchase by an individual member. Now the overseers were a *quasi* corporation, and acting for another, the town; and the sale being fair, we do not see any good reason why an individual overseer might not purchase.

Judgment of nonsuit affirmed.

Asa Robbins *et al. versus* Alvarius Willard *et al.*

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Assumpsit against three as co-partners. Willard was defaulted, and after *primâ facie* evidence of a partnership had been given, his declarations were admitted for the purpose of satisfying the jury of the existence of the partnership; but the *Court* were clear that the evidence was inadmissible for that purpose. *Tuttle* v. *Cooper*, 5 Pick. 414. [2nd ed. 417, note 1.]

Dewey, for the defendants, cited 3 Stark. Ev. 1072; *Whitney* v. *Ferris*, 10 Johns. R. 66; *Whitney* v. *Sterling*, 14 Johns. R. 215; 1 Yeates, 144.

D. Wells and *Grennell*, *contrà*, cited *Nicholls* v. *Dowding*, 1 Stark. R. 81; 2 Stark. Ev. 47, 406.

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[1] See 1 Story's Comm. Eq. 316 *et seq.*

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EBENEZER EATON *versus* WILLIAM WHITAKER.

The plaintiff having declared "that the defendant, administrator, &c. being indebted for money had and received by the intestate, promised" &c. — amended by declaring that "the intestate being indebted for money had and received by him, promised," &c. *Held*, that the amendment was for the same cause of action as the original count.

Where an action was brought up by a demurrer in the Court of Common Pleas, the defendant having liberty to waive his plea and plead anew as of the first term, it was *held*, that he could not plead in abatement the insufficiency of the service, but that he must plead to the merits.

Where a note payable at a day not yet arrived is laid before commissioners on an insolvent estate and disallowed, and thereupon a suit is brought against the administrator, pursuant to *St.* 1784, *c.* 2, it is not sufficient to declare generally as upon a debt already due, but the declaration should set forth the note as it is, and the proceedings before the commissioners, notice, &c.

ASSUMPSIT. The original count in the writ alleged, that Whitaker, administrator &c. of Davis Packard, on the 27th of June, 1827, the date of the writ, being indebted to the plaintiff in the sum of 2000 dollars for so much money before that time had and received by Packard, promised the plaintiff to pay him the same sum on demand; yet, though often requested, neither Packard in his lifetime, nor, after his death, the defendant, had paid any part of that sum.

The writ commanded the sheriff &c. to *summon* the defendant. The officer returned that he *attached* a chip, the property of the defendant, and gave him a summons.

The action was entered in the Court of Common Pleas at August Term 1827, and at the following term in November a demurrer was filed for the purpose of bringing up the case to this Court, the parties reserving liberty to plead anew.

At the first term in this Court the plaintiff obtained leave to amend, upon the common rule; which he did by striking out the original count, and substituting another, in which it was set forth, that Packard, on the 1st day of August, 1825, being indebted to the plaintiff in the sum of 2000 dollars for so much money had and received by Packard, promised the plaintiff to pay him that sum on demand; yet, though requested, neither Packard in his lifetime, &c.

The defendant had leave to plead anew, as of the first 466

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term, and he offered a plea in abatement, alleging that the officer made service of the writ by *attaching the property* of the defendant and by giving him a summons. The plaintiff objected that it was too late to plead in abatement. The defendant contended, that under the leave to plead anew, he had a right to file such a plea; but the judge was of opinion that the leave granted was to be confined to some matter relating to the merits of the declaration as it should be amended, and did not warrant the filing of a plea in abatement of the writ; which remained in its original form. No such plea was offered in the Court of Common Pleas. So the plea in abatement was rejected. The defendant then pleaded the general issue.

The plaintiff offered in evidence a note made to him by Packard, dated June 28, 1824, for 2000 dollars, payable in five years, with interest semiannually; and also proved the death of Packard, the insolvency of his estate, the presentation of this claim to the commissioners of insolvency, their rejection of it because they thought the plaintiff ought to be confined to a mortgage given him by Packard as security for the note, and notice, pursuant to the statute, of his intention to prosecute his claim at common law. This action was accordingly brought to recover the difference between the amount of the debt and the value of the mortgage. The defendant objected that the note was not due and payable until 1829, and was not competent evidence to support the count for money had and received. The judge however admitted it, and the jury gave a verdict for the plaintiff for 667 dollars, as the amount of the debt above the value of the mortgage.

The defendant moved for a new trial on account of these opinions and the admission of this evidence.

Sept 23d. *Brooks*, for the defendant. The original count alleges the claim to have arisen after the death of the intestate, and the promise to have been made by the defendant personally, so that he would be charged *de bonis propriis*; the new count alleges the debt to have been due from the intestate in his life-
467 time, and the promise to have been made by him; the amendment therefore sets forth a new cause of action, and ought not to have been allowed. *Barry* v. *Rush*, 1 T. R. 691; *Jennings* v. *Newman*, 4 T. R. 347 *Rose* v. *Bowler*, 1 H. Bl.

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108 ; *Brigden* v. *Parkes*, 2 Bos. & Pul. 424 ; *Myer* v. *Cole*, 12 Johns. R. 349 ; 1 Chit. Pl. 204.

The defendant having leave to plead anew as of the first term, had a right to plead as he should think proper. It was unnecessary to resort to a plea in abatement until the amendment was made, for the defendant before relied on other ground.

The declaration alleges a promise to pay on demand, but the note was not due when the action was commenced. There is therefore a variance. The declaration ought to have been special, setting forth the proceedings before the commissioners.

Bigelow, *contrà*, to show that the original and amended counts were for the same cause of action, referred to 1 Chit. Pl. 205 ; *Whitaker* v. *Whitaker*, 6 Johns. R. 112 ; *Carter* v. *Phelps's Adm.* 8 Johns. R. 343.

If the service of the writ had become bad in consequence of the amendment, the defendant ought to have been allowed to plead in abatement ; but it did not, for the defect was apparent at the first term in the court below ; the defendant was therefore justly required to plead to the merits. *Moody* v. *Blake*, 6 Mass. R. 459, as corrected in the *Advertisement* to *vol.* 7.

Demands payable at a future day are to be presented for allowance to the commissioners on an insolvent estate. The statute considers such demands (except where they depend on a contingency) as due at the time of the insolvent's decease. It is not usual to set out the proceedings before the commissioners, but to give all the facts in evidence. The allegation of a promise to pay on demand is only matter of form, as time does not enter into the substance of the contract. *Matthews* v. *Spicer*, 2 Str. 806 ; *Stafford* v. *Forcer*, 10 Mod. 313 ; *Cheetham* v. *Lewis*, 3 Johns. R. 42 ; *Tiffany* v. *Driggs*, 13 Johns. R. 253. An action for money had and received resembles a bill in equity, and is not liable to technical objections which might be made to special counts. 2 Stark. Ev. 108.

Per Curiam. The amended count and the original one are for the same cause of action.[1]

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[1] See *Fry* v. *Evans*, 8 Wendell, 530 ; *Clark* v. *Lamb*, *post* 515, note 1.

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The leave granted to plead anew as of the first term has reference to a new plea to the merits. It was too late to plead in abatement.

The declaration alleges a promise to pay a debt on demand, but the evidence is of a promise to pay at a future day, which has not arrived. This would be a fatal variance, but for the statute. The estate was represented insolvent, and the note, though not due, was laid before the commissioners. They ought to allow such debts, rebating the interest where it is proper.[2] This claim was rejected, and it became necessary to bring a suit at law, as allowed by the statute.[3] The proper mode of declaring in the present case was, to set forth the note as it is, and to state that it has been laid before the commissioners and been rejected, &c. whereby an action has accrued, &c.

The verdict must be set aside, and the plaintiff has leave to amend, upon paying costs.

Aaron Brooks *versus* Epaphras Hoyt.

In *case* against a sheriff for a *voluntary* escape of a debtor committed on mesne process, the defendant may prove, in mitigation of damages, that the debtor was unable to pay the debt.

Case against the defendant as sheriff of the county of Franklin. The declaration alleged that one Horsley was arrested at the suit of the plaintiff and committed to the jail in Greenfield, of which the defendant was the keeper, and that the plaintiff afterwards recovered judgment against him for the sum of 99 dollars, but that before the rendition of the judgment the defendant *voluntarily* permitted him to escape, by means whereof the plaintiff lost his debt. In the court below the defendant was defaulted, and the question of damages was submitted to the court. The defendant offered evidence to prove that Horsley was poor and wholly unable to pay any part of the
169 judgment recovered against him. The plaintiff objected to

[2] See *Harding* v. *Smith*, 11 Pick. 480.

[3] See Revised Stat *c.* 68.

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the admission of this evidence in mitigation of damages, and contended that the true measure of damages was the amount of the judgment. The court however admitted the evidence, and assessed only nominal damages; whereupon the plaintiff filed his exceptions.

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Bigelow, for the plaintiff. This being the case of a *voluntary* escape, the policy of the law requires that the officer shall be answerable for the whole debt. Our statute allows a creditor to imprison his debtor with the expectation of thus enforcing payment of his demand, for the debtor may be apparently insolvent when he is not really so. But if the officer may at his pleasure release the debtor from jail and be subjected to only nominal damages, the statute is virtually repealed. *Simmons* v. *Bradford*, 15 Mass. R. 82; *Patten* v. *Halsted*, 1 Coxe (N. Jers.) 277; *Powell* v. *Hord*, 1 Str. 650; *O'Neil* v. *Marson*, 5 Burr. 2812; *Moses* v. *Norris*, 4 Maule & Selw. 397.

Newcomb, *contrà*, cited 2 Chit. Pl. 299, note *k*; 1 Williams's Saund. 38, note 2; 3 Stark. Ev. 1341 [see 5th Amer. Ed. *vol.* 2, *p.* 740,] and Metcalf's note.

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Per Curiam. The distinction attempted to be made between a voluntary and a negligent escape, as it respects damages, is not supported. The one may be as excusable as the other. In all actions of the case, the question is, what is the amount of damage sustained. There is one case against a sheriff (*Simmons* v. *Bradford*) where the debt was considered to be the amount of damages. That was under peculiar circumstances, the sheriff having admitted that he took a bail bond and having refused to deliver it to the creditor.

Judgment affirmed.[1]

[1] See *Richardson* v *Spencer*, 6 Ohio R. 14; *Young* v. *Hosmer*, 11 Mass. R (Rand's ed.) 90 note *a*; *Nye* v. *Smith*, 11 Mass R. (Rand's ed.) 190, note *a*.

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The Inhabitants of NEW SALEM *et al.* Petitioners for a *certiorari*.

The return to the Court of Sessions, of commissioners of highways, of their proceedings in laying out a road, need not state what notice was given to towns and persons interested, and if they have ordered a notice in a particular manner, their return need not state that notice was given in that manner; it is sufficient if it appear from their return that reasonable notice was given.

When the parties interested are duly notified of the time and place of a meeting of the commissioners, no new notice to them is necessary of the time and place of an adjourned meeting; of which they are bound to take notice.

Parties who appear before the commissioners cannot object to the proceedings on the ground of their not having had reasonable notice, unless they make the objection at the time of the hearing.

Where the commissioners of highways, on petitions for a new road, ordered a hearing at a certain time and place, and thirty days' notice of the time and place appointed, to be given to the towns through which the road was to run, and the return of the commissioners stated that on the day appointed they proceeded to the business "having given reasonable notice to the inhabitants of the said towns," one of which towns appeared, and having given "like notice" to certain persons named, being all the persons whom the commissioners knew to be interested in the lands through which the route of the road passed, most of whom also appeared; it was *held*, that the return showed sufficiently that reasonable notice had been given, and the Court refused to grant a *certiorari* on the ground that the notice was insufficient.

The commissioners of highways were authorized to enter into a contract for the making of a road, before making their return to the Court of Sessions.

The commissioners of highways were authorized to make such a contract through the agency of the chairman.

THIS was a petition to the Supreme Court for a *certiorari*. It alleges, that on May 9, 1827, petitions were presented to the commissioners of highways for the county of Franklin for a new road in the towns of Wendell and New Salem; that on the first Tuesday of March, 1828, the commissioners returned to the county commissioners their doings, whereby they located and established a new highway agreeably to the prayer of the petitions; that the present petitioners, *viz.* the town of New Salem, through which the road is to pass, and John Sawyer, Jabez Sawyer junior and Avery Pierce, through whose land it passes, being aggrieved at the proceedings of the commissioners of highways, suggest the following errors in the record and proceedings:—

1. Because the commissioners directed thirty days' notice

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to be given to the towns of New Salem and Wendell, by the sheriff or his deputy, of the time and place appointed to commence proceedings, and the court afterwards proceeded to view the route, and acted on the petitions, although the order had never been complied with. New Salem, Petitioners, &c. 471

2. Because the record does not show what notice was given to New Salem and Wendell, and the individuals through whose land the road passes.

3. Because it does not appear from the record, that Jabez Sawyer junior was either notified to appear before the commissioners of highways, or that any damages have been assessed to him, or that he has sustained no damage.

4. Because the record does not show that the individuals through whose land the road passes, had such reasonable notice as would enable them to appear and be heard upon the merits of the petitions, or that they actually appeared.

5. Because the road was located at a meeting of the commissioners, of which no notice was given to the corporations and individuals interested.

6. Because the commissioners adjudicated upon the manner in which the road should be made, and authorized the same to be contracted for, before they made a return of their proceedings to the Court of Sessions or the county commissioners, and before parties interested had had an opportunity to petition for a jury to alter the location of the road.

7. Because the commissioners of highways authorized an individual to contract for the construction of the road, thereby delegating to another a trust which they were bound to exercise themselves.

The petition concluded by praying for a *certiorari* to the county commissioners to certify the record and proceedings of the commissioners of highways, and that the record and proceedings should be adjudged erroneous and void.

The record of the proceedings of the commissioners of highways showed, that on May 9, 1827, petitions for the road having been presented before them, they appointed Monday, the 27th of August then next, at ten o'clock A. M., and Adams tavern in Montague, the time and place to commence proceedings in regard to the road; and that they ordered that 472

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the town clerks of New Salem and Wendell should be served by the sheriff or his deputy with an attested copy of the petitions and the order thereon, thirty days at least before August 27th, in order to give them and all persons interested an opportunity of opposing the petitions.

The return of the commissioners of highways addressed to the Court of Sessions showed, that the commissioners met pursuant to the order, on August 27, 1827, "having given reasonable notice to the inhabitants of the said towns of New Salem and Wendell," and that the town of Wendell appeared, but that New Salem did not appear; and that having given the like notice to twenty persons, who are named, being all the persons whom the commissioners knew to be interested in the lands over which the route of the road passes, all the persons named so notified, except three, appeared before the commissioners, either personally or by attorney; that Avery Pierce, one of the present petitioners, appeared personally, and Jabez Sawyer junior, another of the present petitioners, appeared as the attorney of another person; that after viewing the routes mentioned in the petitions, the further consideration of the subject was postponed to October 22, then next, at the same place; that on October 22, the commissioners, after reviewing the routes and hearing the parties, adjudged and located the route of the road, and determined the mode of its construction, all which are particularly specified in their return, and also adjudged damages to certain persons whose lands were taken for the road; that among others, thirty-five dollars were adjudged to Avery Pierce; and that William Whitaker Esquire (chairman of the commissioners) was authorized to contract for the construction of the road pursuant to the order.

Sept. 24th. *D. Wells*, for the petitioners, cited *Lancaster* v. *Pope*, 1 Mass. R. 86; *St.* 1825, *c.* 171, § 3.

Bigelow, *contrà*, cited *Lees* v. *Childs*, 17 Mass. R. 351; *Weston*, *Ex parte*, 11 Mass. R. 417; *Lancaster* v. *Pope*, 1 Mass. R. 86; *Commonwealth* v. *Coombs*, 2 Mass. R. 490.

Sept. 26th. PARKER C. J. delivered the opinion of the Court. None of the causes alleged for quashing the proceedings is maintained.

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1. The petition for the road was presented on the 9th of May. The time appointed for a hearing was the 27th of August following. Notice was ordered to be given thirty days before that time. The commissioners return that reasonable notice was given, and we must presume that it was given pursuant to their order. Moreover, that such was the fact appears by the sheriff's return on the order of notice; which was properly exhibited in evidence, a petition for a *certiorari* being an application to our discretion.

2. The commissioners also notified all persons whom they knew to be interested in the land through which the road would pass. They certify that the inhabitants of Wendell did appear, and that many individuals did also appear, and that they had taken a view of the route proposed, after which they adjourned to the 22d of October. This adjournment must be presumed to have been known to the parties interested; indeed they were bound to take notice of it, as they would be of an adjourned term of a court. The parties appearing cannot complain of shortness of notice unless they apply for further time and are refused. This answers the second objection.

3. It is complained that there was no notice of the location of the road; by which it is meant, that it does not appear, that when the commissioners travelled over the land and surveyed the route, parties interested had been notified to appear and be present with them.[1] But this view was only preparatory to the actual location, which is a judicial act, and that was on the 22d of October, at which time the parties might have appeared, having had notice that a final determination would then be made, and the minutes of the commissioners were then before them and open to inspection, and might have been objected to. The parties were present and heard before the adjudication took place.

4. It is objected that the commissioners entered into a contract for constructing the road, before they made their return to the Court of Sessions. This is immaterial, for by the statute then in force it does not appear that the Court of Ses-

[1] See *Rutland* v. *County Com. of Worcester*, 20 Pick. 71.

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sions had any power over the proceedings, and the doings of the commissioners were complete except the making of their return. The contract might be made before, although the agent could not execute it perhaps until the return was made.

5. It was objected that no damage was awarded to Jabez Sawyer junior, and no reason given for omitting him; but it is stated, and not denied, that the only land in virtue of which he could claim damages was supposed to belong to his father, to whom damages were awarded; and Jabez Sawyer junior was present as the agent of his father.

6. As to the objection that the contract was made by the chairman of the commissioners, the statute authorizes the commissioners to *cause* roads to be constructed, and the manner of doing it was left to their discretion.

DAVID RIPLEY *versus* OTIS SEVERANCE, Principal, and JOEL ALLIS, Trustee.

Where a surety receives from his principal, property to secure him against his liabilities, and the principal subsequently makes a settlement with the surety, in which he transfers to the surety his whole interest in the property for a grossly inadequate consideration, the settlement is fraudulent against creditors of the principal; but the surety is still entitled to hold the property to secure him against his original liabilities.

If in such case the surety be summoned as trustee of the principal, he will have a right to deduct from the proceeds of the property all payments which he has made on account of his liabilities as surety, and all amounts which he is still liable to pay on that account, and also any other payments *bonâ fide* made by him on account of the principal; and will be chargeable only for the balance after making these deductions.

Where in such a case, one of the original liabilities was to pay a life annuity to a third person, the Court directed the value of the annuity to be estimated in ready money, and to be deducted from the proceeds in the trustee's hands, and that he should only be chargeable with the balance.

If in such case the parties and all concerned agree, the plaintiff may relieve the trustee from his future liability to pay the annuity.

A person cannot be chargeable as trustee in the trustee process, on account of land which has been conveyed to him by the principal defendant to defraud creditors.

FROM the answers of Allis, the supposed trustee, the following facts appeared: — On the 23d of December, 1818, Allis became surety for the defendant in a bond to Hannah

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Martindale to pay her an annuity of forty-two dollars during her life, if she should see cause to demand it, on account of her having released to William Hanson her dower in certain land; and on the same day he became surety for the defendant in a bond to Hanson, conditioned that Emily Severance, then a minor, should release her interest in the same land to Hanson within two months after she should "become capable in law of making a deed." This last bond was discharged after the service of the writ in this action, by procuring the deed from Emily Severance, Allis paying her the sum here after mentioned. These bonds were fairly made for the purposes specified in their conditions. The defendant, to indemnify Allis for his liabilities, deposited in his hands five promissory notes of Otis Gunn for 200 dollars each, taking a written agreement from Allis that he would deliver up the notes or their amount in money when he should be wholly discharged from the bonds. Allis soon after paid back to the defendant nearly the amount of one of the notes, which had been paid to Allis by Gunn. In February, 1821, Allis paid the defendant 184 dollars, and in October, 1822, 160 dollars, and also paid to creditors of the defendant several small sums amounting to 15 dollars. Allis also became bound for the defendant, to pay Emily Severance 160 dollars, and afterwards paid that sum to her with interest. He also gave up a note for 72 dollars which he held against the defendant, and became bound to pay Uriah Martindale 22 dollars on the defendant's account. The note of 72 dollars which Allis gave back to the defendant had been given to Allis by the defendant as an additional security, at a time when it was supposed that the Gunn notes were not sufficient to indemnify Allis against his liabilities. In September, 1822, Allis became bound to the defendant to support his mother, Hannah Martindale, during her life. In consideration of these payments and obligations of Allis, the defendant, on the last of September or first of October, 1822, discharged him from all notes and book accounts, and agreed that he should have as his own property the notes previously assigned to him; and gave up his written agreement before mentioned for the return of the notes. At the time when this settlement was made, Allis gave the defendant a note for 40

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dollars, and they passed receipts. Hannah Martindale, before the service of the writ in this action, demanded of Allis the payment of the annuity of 42 dollars and all that was due to her on the bond. Allis had accordingly paid her 64 dollars before the date of the writ, and given his note to her for 184 dollars for the arrears of the annuity. In February, 1821, Allis received a deed of land in Pennsylvania, for which the defendant had paid by giving his note for 250 dollars. Allis had to pay the note and costs, which constituted the two payments of 184 and 160 dollars first above mentioned. Allis agreed to allow the defendant to occupy the land five years, paying the taxes but no rent, and to convey it to the defendant when Allis should be discharged from the bond. The defendant absconded in November, 1819, being in debt. At this time there were unsatisfied executions against him in the hands of an officer. The notes of Gunn were all paid to Allis. The defendant is a brother-in-law of Allis.

Sept. 24th.

Wells, for the plaintiff. The money received on the Gunn notes having been received by the trustee, he must be charged, unless he can show clearly how he has disposed of it to exonerate himself. If there is any uncertainty, it must operate against the trustee. *Cleveland* v. *Clap*, 5 Mass. R. 201; *Sebor* v. *Armstrong*, 4 Mass. R. 206; *Hart* v. *Ten Eyck*, 2 Johns. Ch. R. 62, 87. Property placed in the hands of a person by a debtor in fraud of his creditors may be reached by this process. *Burlingame* v. *Bell*, 16 Mass R. 318; *Thomas* v. *Goodwin*, 2 Mass. R. 140; *Hastings* v. *Baldwin*, 17 Mass. R. 552; *Dix* v. *Cobb*, 4 Mass. R. 511. In this case there was a fraudulent contrivance between the defendant and the trustee to keep the property out of the reach of creditors. The inadequacy of the consideration on which the settlement was made was conclusive evidence of fraud. The trustee has an interest in the land, for which he is chargeable.

Grennell and *Ashmun*, for the trustee. This process will not reach real estate, even if fraudulently conveyed. *Howe* v. *Field*, 5 Mass. R. 390. They admitted that the answers

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that the uncertainty was in the transactions themselves, not in the answers.

Wilde J. delivered the opinion of the Court. As the trustee admits that long previous to the service of the plaintiff's writ upon him, divers notes were deposited in his hands as security to indemnify him against certain liabilities, it is incumbent upon him to show clearly that he has been damnified to the amount of the notes; or that the principal has *bonâ fide* discharged him from his liability to account for them; and if this is left doubtful, he must be charged, for no presumption is to be made in his favor.[1]

It is admitted that the first contract, under which the notes were deposited, was *bonâ fide* and valid, and so it clearly appears to have been by the facts as disclosed by the trustee He must be allowed therefore for all payments made or liabilities incurred by virtue of that contract; for the subsequent agreement, although fraudulent as against creditors, did not vitiate the first contract. The trustee therefore is to be charged with the whole amount of the notes against Gunn (1000 dollars and interest), deducting the following payments and liabilities, *viz.* 1. the sum of 160 dollars paid to Emily Severance; 2. the sum of 64 dollars paid to Hannah Martindale, and also the sum of 184 dollars secured to her by note. As to any future liabilities of the trustee to H Martindale, the value of the annuity of 42 dollars may be computed in ready money, having regard to the age of the annuitant; or if the parties and all concerned agree, the plaintiff may relieve the trustee from his future liability in this particular. 3. The trustee is also to be allowed the sum of 200 dollars, which, as he states, he paid to the principal, being about the amount of one of the notes deposited. 4. We think also that the trustee should be allowed the sum of 37 dollars paid to Uriah Martindale and other creditors; for although this payment was not made under the first contract, yet it was made *bonâ fide*, and in satisfaction of just demands against the principal; it ought therefore to be deducted from the funds of the principal in the hands of the

[1] See *Harris* v. *Aiken*, 3 Pick. (2nd ed.) 4, note 1; *Kelly* v. *Bowman*, 12 Pick. 383; *Gordon* v. *Coolidge*, 1 Sumner, 537.

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trustee.[2] These deductions being made from the amount of the notes against Gunn, the trustee must be charged with the surplus; for it is very clear that the discharge given him in 1822 was void as against creditors, and that his other claims on the trust fund cannot upon any principle be supported. The sums of 184 dollars and 160 dollars were paid for the land in Pennsylvania conveyed by Peck; and the note for 72 dollars was without consideration, and was therefore rightly given up. The note for 40 dollars also, given by the trustee on the settlement in 1822, was without good consideration, or rather the consideration has failed, as the creditors of the principal see fit to set aside that settlement.

As to the land in Pennsylvania, the trustee cannot be charged upon the facts disclosed. It does not appear that the present value of the land exceeds the sum paid for it by the trustee; and it cannot be presumed; but if it could, the trustee would not be liable in this process.[1]

Trustee charged.

LYMAN SAWYER *versus* CALVIN MERRILL *et al.*

If an officer, having attached goods of a debtor, suffers them to remain intermingled with other goods of the debtor, and makes claim to the whole, so that another officer, having a writ against the same debtor, cannot distinguish which have been attached, the latter officer will be justified in attaching the whole.

It is not a ground for a new trial, that the judge, after having summed up the cause, instructed the jury, on motion of counsel, upon a point arising out of the facts in the case but not previously suggested, such course of proceeding being a matter within the discretion of the judge; but if the losing party might have produced material evidence on such point, in case it had been earlier presented, he has a remedy by petition for a new trial.

TRESPASS for taking certain articles of household furniture, the property of the plaintiff. Trial before *Morton* J., upon the general issue.

[2] See *Lamb* v. *Stone*, 11 Pick. 533; *Boston Type &c. Co.* v. *Mortimer*, 7 Pick. 166; *Andrews* v. *Ludlow*, 5 Pick. 32.

[1] See *Bissell* v. *Strong*, 9 Pick. 564, 565; *Dickinson* v. *Strong*, 4 Pick (2nd ed.) 58, note 1; *Webb* v. *Peele*, 7 Pick. 247; *Gore* v. *Clisby*, 8 Pick 555; *Risley* v. *Wells*, 5 Connect. R 431

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The defendants admitted the taking, and it was agreed, that at the time of the alleged trespass, the general property in the articles was in Norman Smith. The plaintiff, to prove a special property in himself, produced a writ in favor of one Whitaker against Norman Smith, dated December 16, 1825, upon which the plaintiff, as a deputy 479
sheriff, had returned an attachment of the chattels on the same day. The defendants introduced a writ in favor of Rodney Smith, one of the defendants, against Norman Smith, dated December 17, 1825, upon which Merrill, the other defendant, had returned an attachment of the same chattels with many others. Both of these writs were regularly entered and judgment rendered in favor of the respective plaintiffs. Merrill, soon after he attached the property, sold it by public auction.

It appeared that the articles claimed to be attached by the plaintiff, remained in Norman Smith's house with other similar property liable to attachment, at the time when the defendants made their attachment. The plaintiff alleged, that when he attached the property, he made a list of the articles, and put it into the hands of a keeper, who was a witness on the trial, and who testified that he then had such a list, though he had since lost it. When the defendants were taking the articles in Smith's house and were about to remove them, the plaintiff and the witness claimed them as having been attached by the plaintiff, and forbade the defendants' taking and removing a single article; but the defendants proceeded, notwithstanding this objection, and removed the goods.

After the judge had ended his charge to the jury, the defendants' counsel moved to have them instructed, that if they were satisfied that the articles claimed by the plaintiff, were so intermingled with other property of Norman Smith liable to attachment, that the defendants could not distinguish what had been attached from what had not, and if they were satisfied that the plaintiff made a general claim of the whole without designating the articles which he had attached, so that the defendants could have no means of knowing which had been attached and which not, then that the de

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fendants were justified in attaching the whole. This motion was objected to by the plaintiff's counsel, because this point had not been stated during the trial, and he had had no opportunity to comment upon it and upon the evidence relative to it. But the judge gave the plaintiff's counsel
480 permission to make any comments which he might think necessary upon it, and if he chose, to examine his witnesses relative to it; but this he declined doing, alleging that his witnesses had left town. The plaintiff then contended, that as the defendants were taking the whole property in the house liable to attachment, and persisted in doing so after they were forbidden, it was not necessary for the plaintiff to inform them which articles he had attached; but the judge instructed the jury in the manner stated in the defendant's motion.

A verdict was returned for the defendants; but if these instructions were wrong, a new trial was to be granted.

Sept. 25th. *Dewey*, for the plaintiff, referred to *Davis* v. *Mason*, 4 Pick. 156.

Ashmun, *contrà*, cited *Bond* v. *Ward*, 7 Mass. R. 123; *Gordon* v. *Jenney*, 16 Mass. R. 465.

Sept. 26th. *Per Curiam.* The instruction to the jury was in itself correct. It was in the power of the plaintiff to designate which articles he had attached, but he refused to do so and claimed the whole; so that the defendants were obliged to take the whole, in order to obtain a lien on those which had not been attached. The same principle applies here as in the case of a stranger's goods intermixed with those of the debtor.[1]

The objection is however rather to the time than to the matter of the instruction. It is said the plaintiff had not an opportunity to comment on the point made by the defendants, and to produce counteracting evidence; and there may have been some inconvenience in the course pursued; for though probably no further evidence remained to be adduced, yet it is to be expected that all the material points will be suggested before the judge begins to sum up. But

[1] See *Lewis* v. *Whittemore*, 5 N. Hampsh. R. 364.

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the judge may think of some point which the counsel did not, or *vice versâ*; and if it is based on the facts in the case, stating it to the jury will not be a ground for a new trial. It is a matter within the discretion of the judge. If evidence could have been given which would have shown the suggestion to be of no force, the party may have the benefit of it upon a petition for a new trial; so that no injury will be done. In the case referred to, of *Davis* v. *Mason*, the opening and closing of the argument was considered to be a matter of right; but here the course of proceeding was discretionary, and as no injustice appears to have been done, a new trial cannot be granted. 481

Judgment according to verdict.

JOHN HOOKER, Judge, &c. *versus* ASA OLMSTEAD *et al.*

Where a creditor of an intestate estate represented insolvent, had his whole claim allowed by the commissioners, notwithstanding it was partially secured by a mortgage, and received a dividend upon the whole, he was held to have waived his security by the mortgage.

Where an administrator appointed here takes out letters of ancillary administration in another State, and thereupon collects debts of citizens of such State, and sells land there situate, the administration of such assets is not covered by his bond given here, but he will be presumed to have rightly accounted for the same in such other State.

But moneys received in another State, of debtors living here, are to be accounted for in this State.

Where, in an action on an administration bond, a forfeiture was confessed and the parties were heard in chancery, it was *held*, that the execution against the administrator might include sums received by him since the commencement of the action.

DEBT upon a bond given to the judge of probate of the county of Hampden, by Asa Olmstead as principal, and the other defendants as sureties, for the faithful administration of the estate of David Olmstead, deceased, intestate. The defendants confessed a forfeiture, and the case was referred to auditors. *Sept 26th*

By the report of the auditors it appeared, that the estate of the intestate was represented to be insolvent. The plaintiff alleged that the administrator had been guilty of

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Hooker v. Olmstead.

maleadministration in regard to a debt due to Rufus Flynt. This claim, amounting to 937 dollars 64 cents, was stated to have been allowed by the commissioners of insolvency, with the administrator's assent, as a debt secured by a mortgage. The order of distribution was made upon the whole of the debt, instead of its excess above the value of
482 the land mortgaged, and the sum of 813 dollars 87 cents was decreed to be paid to Flynt. The mortgaged premises were conveyed to Flynt in part-payment of his debt, namely, to the amount of 700 dollars, and the sum of 110 dollars was paid to him in cash. If the order of distribution had been made only upon the excess of Flynt's debt above the value of the land, he would have been entitled to 74 dollars more than he received under the actual distribution. The administrator, in exceptions to the auditors' report, denied that the claim of Flynt was allowed by the commissioners with his knowledge as a debt secured by mortgage; and he contended that it did not lie with the plaintiff to object to his own decree.

By the Court. Inasmuch as the creditor filed his claim generally with the commissioners, and a distribution was decreed upon an allowance of the whole claim, we think he waived his right under the mortgage.

It further appeared, that Asa Olmstead, after his appointment as administrator in this State, also took out letters of ancillary administration in the State of Connecticut, where he received assets by the collection of debts and the sale of land. The estate was there represented insolvent, and certain sums were returned by commissioners of insolvency as due to certain Connecticut creditors, which were paid *in full* by the administrator, as appeared by his first administration account settled in Connecticut. Upon an extension of the time for receiving claims, other debts (being those of the Massachusetts creditors) were allowed by the commissioners, upon which a dividend was decreed of the balance of the money received in Connecticut. The plaintiff contended, that the Connecticut creditors who were paid in full ought not to have received more in proportion

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than the creditors in Massachusetts. To this point his counsel cited *Stevens* v. *Gaylord*, 11 Mass. R. 256, [Rand's ed. 264, note *a* ;] *Dawes* v. *Head*, 3 Pick. 128, [2nd ed. 147, note 1.] The counsel on the other side referred to *Austin* v. *Gage*, 9 Mass. R. 395 ; *Doolittle* v. *Lewis*, 7 Johns. Ch. R. 45 ; *Riley* v. *Riley*, 3 Day, 74 ; *Slocum* v. *Sanford*, 2 Connect. R. 533, 535 ; *Bush* v. *Sheldon*, 1 Day, 170 ; *Brown* v. *Lanman*, 1 Connect. R. 467 ; *Jacobs* v. *Hull*, 12 Mass. R. 25 ; *Stevens* v. *Gaylord*, *ubi sup.* 483

By the Court. The plaintiff is not entitled to execution for the sums collected in Connecticut from debtors living there and from the sale of the real estate. They do not come within the bond,[1] and it is to be presumed that the administrator has rightly accounted for them in that State. Two small sums however, which were accounted for there, were received of debtors belonging to this State ; and for those he is bound to account here, though he may have received the payment in Connecticut.[2]

Some debts were collected by the administrator since this action was commenced, and it was contended by the defendants that the execution to be issued ought not to include these sums ; but the *Court* said, that as this was a hearing in chancery, they might be taken into consideration.

Bates and *G. Bliss* junior, for the plaintiff.

G. Bliss senior and *Lathrop*, for the defendants.

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[1] See *Peck* v. *Mead*, 2 Wendell, 471; Story's Confl. Laws, 437, 438.

[2] See Story's Confl. Laws, 431, note 2, and cases cited, 423 · Revised Stat. s 70, § 23; *Dawes* v. *Head*, 3 Pick. (2nd ed.) 147, note 1.

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ELIHU SMITH *versus* MARIA JULIANA SAXTON.

The *St.* 1783, *c.* 44, § 8, prohibits sheriffs from making or filling up any plaint, declaration, writ, or process, and provides, that "all such acts done by either of them shall be void." A writ and declaration were written by a deputy sheriff, as attachment of land made upon the writ, and the land seasonably set off on an execution issued on a judgment recovered in the suit. Subsequently to the attachment, and previously to the judgment, the debtor conveyed the land to a *bonâ fide* purchaser for a good consideration. It was *held*, that this conveyance defeated the attachment, and that the title of the purchaser was good against the judgment creditor. *It seems* that as between the parties such judgment is good.

THIS was a real action in which the demandant claimed half an acre of land in Deerfield, counting on his own seisin within thirty years, and a disseisin by the tenant. The plea was *nul disseisin*.

At the trial, before *Morton* J., the demandant produced a writ in his favor against H. W. Strong, dated May 25, 1824, on which the land demanded was attached the same day. The
484 action was entered at the August term 1824, and there being no appearance, was continued on the plaintiff's motion to November term 1824, when the defendant was defaulted and judgment given for the plaintiff for 316 dollars 94 cents and costs. The execution which issued on this judgment was levied on the demanded premises December 24, 1824.

The tenant gave in evidence a deed of release of the land demanded, from Strong to Joel Saxton, dated July 17, 1824, and a deed of the same land from Joel Saxton to the tenant, dated July 20, 1824 The tenant called Strong, who testified that about twenty-six years ago, he agreed to sell the land to Joel Saxton, and gave him a bond, the condition of which was that Strong should convey the land to Saxton when he paid for it; that Saxton had occupied the land ever since; that he, Strong, became insolvent July 12, 1824, and soon after, thinking that Saxton had nearly or quite paid for the land in his labor, though no settlement had been made between them, executed the deed to Saxton, and sent it to him by mail.

The demand on which the demandant's attachment was made, was a note given by Strong to Austin Smith, and by

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him indorsed to the plaintiff; and evidence was offered tending to show that Austin Smith was the real owner of the note at the time of the attachment, and had received part of the amount due on it after that time; and had obtained another judgment on it in the name of another person as indorsee, previously to the judgment obtained by the demandant.

It also appeared that the writ on which the land was attached by the demandant, and the declaration in it, were in the handwriting of Austin Smith, who was a deputy sheriff and served the writ. The counsel for the tenant contended, that the writ and attachment were, on this account, void as against her. If they were void, or for this cause might be avoided by the tenant, the demandant agreed to become nonsuit.

Billings and *Dewey*, for the demandant. The word *void* in *St.* 1783, *c.* 44, § 3, means voidable. In order to avoid the process, because the writ and declaration were in the handwriting of a deputy sheriff, the matter should have been pleaded by Strong in the original action. It is now too late to take advantage of it. The judgment of the court can only be vacated by a writ of error brought by Strong himself, and is as binding on the tenant as it is on him. They cited *Commonwealth* v. *Pejepscut Proprietors*, 7 Mass. R. 430; *Prigg* v. *Adams*, 2 Salk. 674; Co. Litt. 259; *Cooke* v. *Gibbs*, 3 Mass. R. 193; *Keen* v. *Turner*, 13 Mass. R. 265; *Peck* v. *Woodbridge*, 3 Day, 30; *Homer* v. *Fish*, 1 Pick. 435; *Loring* v. *Mansfield*, 17 Mass. R. 394; *Smith* v. *Lewis*, 3 Johns. R. 157; *Thatcher* v. *Gammon*, 12 Mass. R. 268; *Andrews* v. *Linton*, 2 Ld. Raym. 885; Com. Dig. *Pleader*, *B* 3; *Prescott* v. *Tufts*, 7 Mass. R. 209; *Whelpdale's Case*, 5 Co. 119; Bull. N. P. 224; *Merchants' Bank* v. *Cook*, 4 Pick. 411.

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The tenant in this case, being grantee and privy in estate to Strong, is estopped from avoiding the judgment against him. Co. Litt. 352 *a*; Com. Dig. *Estoppel*, *B*; Phil. Ev. 245. But if the doctrine of estoppel does not apply, the tenant cannot in this mode take any advantage of this defect, as the judgment can only be avoided in the three ways mentioned in 1 Stark on Ev. 253.

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Smith v. Saxton.

D. Wells and *Ashmun*, for the tenant. The attachment is void if the statute is construed as it should be, according to its natural import. The difference between erroneous and void proceedings, is well settled; erroneous require to be avoided, but a void process is a nullity. The proceedings in this case were absolutely *void*, not merely voidable. They cited *Perkin* v. *Proctor*, 2 Wils. 385; *Turner* v. *Felgate*, Lev. 95; *Prigg* v. *Adams*, Carth. 274; *Lincoln College's Case*, 3 Co. 59; *St.* 1 *Eliz. c.* 10; *Bishop of Salisbury's Case*, 10 Co. 59 *a*; *Smalwood* v. *Coventry*, Cro. Eliz. 207; *St.* 13 *Eliz. c.* 6; Co. Litt 45; *Winchcombe* v. *Winchester*, Hob. 165; *Doe* v. *Barber*, 2 T. R. 749; *Crosley* v. *Arkwright*, 2 T. R. 603; *Lowe* v. *Waller*, 2 Doug. 736; *Green* v. *Kemp*, 13 Mass. R. 515; *St.* 1784, *c.* 29, § 13; *St.* 27 *Eliz. c.* 4; *Preston* v. *Crofut*, 1 Connect. R. 527, in note; *Roberts* v. *Anderson*, 3 Johns. Ch. R. 371. The policy of the statute,
486 which was designed to prevent fraud on the part of the officer, requires that the word *void* should be construed strictly; otherwise the statute would be of no avail. It was intended, not to protect the defendant, for he is sufficiently protected without this statute, but to protect third persons, like the tenant in this case, from collusion between the plaintiff, the defendant and the officer. One object of this statute is to prevent litigation, which is always a favorite object of the law. *St.* 1811, *c.* 62; Anc. Charters &c. 617. Even if the word *void* in the statute is to be construed *voidable*, the process must be voidable by creditors. *Peirce* v. *Jackson*, 6 Mass. R. 242. If it is voidable by the debtor only, he has avoided the attachment by his deed. *Crosley* v. *Arkwright*, 2 T. R. 603. Though the defendant cannot avoid a judgment except by error, strangers may do it collaterally by plea. *Warter* v. *Perry*, Cro. Eliz. 199; *Proctor* v. *Johnson*, 2 Salk. 600; *S. C.* Ld. Raym. 669; *Burt* v. *Sternburgh*, 4 Cowen, 557. But the title of the tenant takes place of the attachment, and precedes the judgment.

April term 1829.

The opinion of the Court was delivered by

PARKER C. J. We are of opinion that the attachment made under the writ in favor of the demandant, on which judgment was rendered and levy made on the demanded premises,

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cannot avail against the tenant's title under the deed of H. W. Strong, the judgment debtor, to Joel Saxton, connected with the original contract for the purchase of the land and the continued possession of Saxton for twenty-six years, and the consideration paid according to that contract.

It appears in the case reported, that the writ above mentioned was made out by the brother of the demandant, then a deputy sheriff, and there is reason to believe that this was done without any authority from the demandant, and even without his knowledge; so that the presumption arising from that and other circumstances in the case, is very strong, that the deputy sheriff himself, who filled out the writ, and not the demandant, had the property of the note at the time when the writ was served.[1] But without regarding these circumstances, we consider the provision of the *St.* 1783, *c.* 44, § 3, as decisive 487
against the claim of the demandant. The provision is, that "no sheriff or his deputy shall be allowed to draw, make or fill up any plaint, declaration, writ or process, or to draw or make any plea for any other person; but all such acts done by either of them shall be void."[1] If void according to the terms of the statute, then all proceedings under a writ so made out must be entirely nugatory, and there would be nothing to intercept the tenant's title. But it has been argued, that by judicial construction of like words in British acts of parliament and Massachusetts statutes, the extent and force of the term *void* have been limited, so that in truth it means *voidable*, or to be made void by some plea or act of the party in favor of whose interests such statutes are set up. And there is no doubt that such decisions have taken place both here and in England, and that they are founded in good sense and reason, and conform to the intention of the legislature in their use of the term. An infant's acts, by the common law, are said to be void, and yet they may be confirmed on his coming of age; which is inconsistent with their absolute nullity.[2] Usurious debts and gaming contracts are declared to be void, and yet

[1] See Revised Stat. *c.* 14, § 79.

[1] See Revised Stat. *c.* 14, § 79; *c.* 88, § 29; *Clark* v. *Lyman*, 10 Pick. 45.

[2] See *Thompson* v. *Lay*, 4 Pick. (2nd ed.) 49, note 1.

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a plea is necessary to avoid them, and a judgment precludes a party from showing they were void. The cases cited by the demandant's counsel sufficiently establish this point. But this case is distinguishable from any of those cited, for the defence does not seek to avoid the judgment upon a writ which the debtor did not himself see fit to avoid by plea or motion to the court, but only that the rights of the tenant shall not be injuriously affected by an act which the statute had peremptorily prohibited and declared to be void.

One of the objects of the legislature in making this provision probably was, to prevent unjust preferences in attachments by the instrumentality of sheriffs or their deputies, who have great opportunities and means of defrauding creditors by secret attachments. In most cases the parties to the action would be privy to the doings of the sheriff, and in all cases the plaintiff in the suit would be presumed to have authorized his acts.

488 Subsequent attaching creditors and purchasers, knowing of such writs, have a right to consider them void, and if they can be made good by the consent of the debtor to suffer judgment, the intention of the legislature would be frustrated. Third parties then so situated must have a right to question the validity of such attachments, and there is no other way of exercising that right, than by showing the fact when the title founded upon the attachment shall be set up against them. There is no need, for this purpose, of avoiding the judgment; that may be conclusive between the parties to it, but the levy, which is good only in virtue of the attachment, may be avoided, and the judgment creditor made to seek satisfaction from some other property.

The title remained in Strong, notwithstanding the attachment, until the execution of his deed to Joel Saxton. Strong parted with his right by that deed to Saxton, who was in possession with an equitable title to the land, which he could have enforced upon his bond by a bill in equity. The question is, whether the attachment was an incumbrance or lien which could afterwards be converted into a title by the levy. It was no incumbrance against a *bonâ fide* purchaser, because by statute the writ and attachment were void, and in regard to

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Saxton were avoided by the conveyance to him. If Strong should attempt to avoid the judgment by error, then the cases which have been cited will apply.

WILLIAM HUNT *versus* DANIEL MAYNARD. 489

A mortgagee who has not taken possession of the mortgaged property, and become accountable for rents and profits, is not a trustee for the mortgager.

Therefore, this Court, under *St.* 1817, *c.* 87, which gives it authority "to hear and determine in equity, all cases of trust arising under deeds," has no jurisdiction of a bill in equity brought by the assignee of the mortgager, in order to obtain an injunction against the mortgagee's proceeding at law to recover possession of the mortgaged property, and to have the mortgage deed cancelled.

It seems that a court of equity would not prevent a mortgagee from proceeding at law to recover possession of the mortgaged property, on the ground of a parol agreement made by him with the assignee of the mortgager, that the assignee should hold the land discharged from the mortgage.

THIS was a bill in equity. The bill sets forth, that Nathaniel Maynard, on the 2d of March, 1814, mortgaged a tract of land to his father, Daniel Maynard, the defendant, to secure a note for 500 dollars, given by Nathaniel to Daniel, payable in one year; that Nathaniel continued in possession of the land without any entry being made upon him by the defendant, and on May 1, 1819, he sold and conveyed the land to the plaintiff, for a consideration equal to the whole value of the land, by a deed with covenants of warranty against all persons and for quiet enjoyment; that under this deed the plaintiff entered on the land and has continued in possession ever since. The bill further alleges, that the plaintiff, feeling apprehensive that he might have to pay the balance due on the note of Nathaniel Maynard, and that he should be unable to recover the same of him, unless he, the plaintiff, immediately paid off the incumbrance and sued Nathaniel to secure the amount thus paid, did, on March 20, 1820, inquire of the defendant if he would receive the amount due on the mortgage and discharge it, which the defendant then agreed to do; that the plaintiff, relying on this promise, on November 1, 1820, sent a messenger with the money to the defendant, and that the

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messenger tendered the defendant the amount then due on the mortgage; but that the defendant, being apprehensive that the design of the plaintiff in paying the money was to obtain a right to sue the defendant's son, refused to take the money; and in order to induce the plaintiff to desist from his purpose of securing himself from his liability, pro-
490 fessed great friendship for the plaintiff and his family, and gratitude for their kindness to a child of the defendant's, and stated that he should take this opportunity to make a requital; and that he would so manage his affairs that the plaintiff should never suffer by or on account of the mortgage; and that if the plaintiff would not insist on paying the mortgage, and would forbear to sue his son for a breach of the covenants in his deed, the plaintiff should hold the land for ever discharged from the mortgage. The bill further alleges, that the plaintiff, relying on these assurances, took no further measures to secure himself, and forbore to sue Nathaniel for a breach of his covenants; that Nathaniel became insolvent about the first of the next January, and has ever since continued so; that on or about March 15, 1826, the defendant commenced a suit in the Court of Common Pleas against the plaintiff to recover possession of the mortgaged property, to which suit the present plaintiff pleaded in bar the matters above set forth, and on a trial by jury in this Court a verdict was found in his favor; that no judgment was rendered on the verdict, but the case having been continued for the opinion of the whole Court, a new trial was granted, on the ground that the matter set forth in the plea did not constitute a legal defence to the action. (See *Maynard* v. *Hunt*, 5 Pick. 240.)

The bill, after averring that the legal advantage obtained by the defendant is inequitable and founded in fraud, asserts the jurisdiction of this Court as a court of chancery, on the ground that the defendant's estate is a trust estate created by deed, and concludes by praying that the mortgage deed made by Nathaniel Maynard may be delivered up to the plaintiff and cancelled, and that the defendant be enjoined from proceeding in his action at law, and from

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commencing any other suit to recover possession of the mortgaged premises, and for general relief. Hunt v. Maynard.

To this bill the defendant demurs generally.

D. Wells, for the plaintiff. A mortgagee has a trust estate in the mortgaged property. Pow. on Mortg. 142. The estate of the defendant being a trust estate under a deed, this Court has jurisdiction by *St.* 1817, *c.* 87, and has power not only to issue an injunction, but to compel the deed to be given up. *St.* 1823, *c.* 140. If the Court has jurisdiction, it is a case proper for equitable relief; the circumstances show the grossest fraud on the part of the defendant. *Lansing* v. *Eddy*, 1 Johns. Ch. R. 51; *Swift* v. *Dean*, 6 Johns. R. 523; *Foster* v. *Wood*, 6 Johns. Ch. R. 87; 1 Madd. Ch. Pr. 111; *Simpson* v. *Hart*, 1 Johns. Ch. R. 98; *Briggs* v. *Law*, 4 Johns. Ch. R. 22. The situation of a mortgager and his assignee with regard to the mortgage debt, is analogous to that of principal and surety; the assignee is a surety for the mortgager, and entitled to the same relief in this case which a surety would be. *Hayes* v. *Ward*, 4 Johns. Ch. R. 123; *Pain* v. *Packard*, 13 Johns. R. 174; *King* v. *Baldwin*, 17 Johns. R. 384. *Sept. 26th.* 491

Grennell, for the defendant. This Court has repeatedly said that it will not extend its equity jurisdiction beyond what is manifestly given. The interest of a mortgagee is not a trust arising under a deed, within the meaning of the statute. The mortgagee is not a trustee, until he takes possession and receives the rents and profits, for which he becomes accountable to the mortgager. Even in England a mortgage is not considered a trust estate. Co. Litt. 36, note *z*, by Thomas, and 38, *Tucker* v. *Thurston*, 17 Ves. 133. In *Putnam* v. *Putnam*, 4 Pick. 139, the Court say that no additional authority "is given to this Court, as a court of equity, on the subject of redeeming mortgages, by any of the several statutes which have been passed in relation to the chancery jurisdiction of this Court."

The opinion of the Court was drawn up by

PARKER C. J. Has the Court jurisdiction of this case by virtue of the statute of 1817? It has not, unless the mortgage deed created a trust within the meaning of that statute *April term* 1829.

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But a mortgage deed does not *per se* create a trust; it conveys the estate subject to a condition. The mortgagee is not accountable to any one until he enters and takes possession and receives the rents and profits; in which case he may in some sense be considered as trustee, for he is to render an account;[1] but this must be done in the manner and for the purposes provided in the several statutes for redeeming mortgages, and he is not trustee in any other light.[2]

492 The object of this bill would seem to be, to devest the mortgagee's estate by parol evidence of a promise founded on no legal consideration. If here were written evidence, the want of consideration would be fatal to the claim. And without such evidence, it would be unhinging our whole system of titles in real estate, to defeat the operation of a legal instrument under seal, in this way. We are called on to enjoin against the use of a mortgage deed, by verbal proof that the respondent had given up his estate. The proposition is self-evidently false.[1]

If the plaintiff has any case upon his representation, it is one of fraud, of which no jurisdiction has been given to this Court, unless it incidentally arises in cases where we have jurisdiction.

We are clear that the demurrer to the bill must prevail, and that the bill must be dismissed with costs.

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[1] See Revised Stat. *c.* 107, § 9.

[2] See 2 Story's Comm. Eq 278, 283; *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 1, 182 *et seq.*; Revised Stat. *c.* 81, § 8.

[1] See *Maynard* v. *Hunt*, 5 Pick. 243.

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WILLIAM WADE *versus* CHARLES HOWARD *et al.*

Where the purchaser of an equity of redemption of land which is subject to two mortgages, pays and takes an assignment of the first mortgage, *it seems*, that he does not thereby acquire the rights of an assignee of the first mortgagee, but that the first mortgage is discharged.

A purchased on execution the equity of redemption of land which was subject to two mortgages; he then paid the first mortgage and took from the mortgagee a deed purporting to "release, grant, bargain and sell" the mortgagee's interest in the land, and adding, "the aforesaid sum having been this day paid me in discharge of said mortgage." In a writ of entry by A against the second mortgagee to obtain possession of the land, it was *held*, that the deed to A was not an assignment, but a discharge of the first mortgage.

Parol evidence is not admissible in such a case to show the intentions of A in receiving, or of the first mortgagee in giving such a deed

THIS was a writ of entry on the demandant's seisin within thirty years. Plea, *non disseisivit*, and issue thereon.

At the trial, before *Putnam* J., the demandant, to maintain the issue on his part, offered a mortgage deed of the land, dated April 29, 1819, from Thomas Fry and Nathaniel Fry to John Gould, to secure 1500 dollars, and an assignment on the back of the mortgage from Gould to Justice Willard, dated February 8, 1825, and a deed from Willard to the demandant dated February 26, 1827, by which Willard, in consideration of 527 dollars and ten cents, paid by the demandant, did "remise, release, grant, bargain, sell and forever quitclaim" to the demandant, all his "right, title, interest and estate of, in and to" the demanded premises, "being the same land which was mortgaged to John Gould by Thomas Fry and Nathaniel Fry by their deed dated the 29th of April, A. D. 1819, and assigned by said Gould to me on the 8th day of February, A. D. 1825, together with the evidences of the sum remaining due on said mortgage; meaning hereby to release all the right I have in the premises by virtue of said mortgage and assignment, *the aforesaid sum having been this day paid me in discharge of said mortgage.*" It was proved that Gould had entered on the demanded premises for condition broken, and that the right to redeem would have been foreclosed February 27, 1827, and that the demandant paid Willard the money due on the mortgage 493

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Wade v. Howard.

February 26, 1827, on which day Willard's deed to him is dated.

The tenants, Howard and Lathrop, offered in evidence a deed of Nathaniel Fry to Thomas Fry, dated March 12, 1821, of his interest in the demanded premises, a mortgage from Thomas Fry to Nathaniel of the same date to secure 1000 dollars, an assignment of this mortgage from Nathaniel Fry to Joseph and Elijah Bissel, and an assignment from them to the tenants. Thomas Fry gave possession to the tenants December 8, 1823. The tenants also produced a deed from David H. Merwin, a deputy sheriff, dated January 7, 1824, conveying to the demandant all Thomas Fry's right to redeem the demanded premises, which had been taken and sold on execution; and referred also to a bill in equity of the demandant against the tenants, pending at the time of the trial, which states the fact that the tenants had possession December 8, 1823.

Willard held the premises as trustee for the tenants, they having furnished him with the money.

It was proved by parol evidence, that Wade wished Willard to *assign* the mortgage and moneys and evidences of the debt due thereon, to the end that Wade should stand in
494 the place of Gould, and have the benefit of the foreclosing of the first mortgage, and so of excluding the claim of the tenants as assignees under the second mortgage. Parol evidence was offered to show that Willard objected to giving an assignment of the mortgage, and that he did not intend that his deed should operate as an assignment, but as a discharge of the first mortgage, and to save the right of the tenants under the second mortgage; that the evidences of the debt were delivered by Willard to G. Bliss junior, Wade's attorney, Willard intending that the delivery of them should be considered as of notes delivered up on payment, and Bliss claiming to hold them and the deed as a legal assignment to Wade. Bliss prepared a release and assignment in apt words to carry Wade's object into effect, but Willard refused to execute it. Parol evidence was also offered of conversation and other circumstances to show the intention of Willard in the instrument which he executed, and also the

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wishes of Wade's attorney. The demandant's counsel objected to the parol evidence.

If the Court should be of opinion that the demandant was assignee of the first mortgage, the tenants were to be defaulted. If the first mortgage was discharged, and not assigned, by Willard's deed to the demandant, the demandant was to become nonsuit.

The demandant having died since the first day of the term, and before the argument, a question was made whether judgment might not be entered, as of the first day of the term; the Court, however, without giving any opinion on the point, directed the case to be argued.

Ashmun and *G. Bliss* junior, for the demandant. The deed of Willard to the demandant was an assignment of the first mortgage in the most general and effectual terms. 4 Cruise, 161. Where a deed may enure to divers purposes, he to whom it is made, may elect which way to take it, and he may take it that way which is most for his advantage. Shep Touch. 83; Co. Litt. 301 *b*; *Hayward's Case*, 2 Co. 35 The assignment of the mortgage did not operate as a merger, for the Court will prevent a merger where it would operate against the interest or intent of the party taking the estate. Vin. Abr. *Merger*, *A*, 2; *Gibson* v. *Crehore*, 3 Pick. 482; *James* v. *Morey*, 2 Cowen, 284; *Chandos* v. *Talbot*, 2 P. Wms. 601; *Thomas* v. *Kemeys*, 2 Vern. 348; *Wyndham* v. *Egremont*, Ambl. 753; *Gardner* v. *Astor*, 3 Johns. Ch. R. 53; *Starr* v. *Ellis*, 6 Johns. Ch. R. 393; *James* v. *Johnson*, ibid. 417; *Taylor* v. *Bassett*, 3 N. Hampsh. R. 294; *Freeman* v. *Paul*, 3 Greenl. 260; *Archer's Case*, 1 Co. 66. The intervening incumbrance in this case prevents the merger. Merger depends on the intention of the party. If it is for the interest of the party to uphold a charge, as it is in this case, an intent to do so will be presumed, and no merger will take place. *Compton* v. *Oxenden*, 2 Ves. jun. 263; *Forbes* v. *Moffatt*, 18 Ves. 384; *Chandos* v. *Talbot*, 2 P. Wms. 601; *Chester* v. *Willes*, Ambl. 246; *Powell* v. *Morgan*, 2 Vern. 90; *Popkin* v. *Bumstead*, 8 Mass. R. 491; *Snow* v. *Stevens*, 15 Mass. R. 278; *Gibson* v. *Crehore*, 5 Pick. 150; *Barker* v. *Parker*, 4 Pick. 505.

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The clause in Willard's deed, "the aforesaid sum having been this day paid me in discharge of said mortgage," cannot control the effect of the deed. It only shows Willard's intent; whereas the intent of the party taking the deed must govern. But it is clear in this case, that the grantor intends to bargain and sell, as well as to release, and where there is a repugnance in the different parts of a deed, the first part operates in preference to the last. Touch. 99; 2 Preston on Conv. 439, 440; *Stukely* v. *Butler*, Hob. 170; *Cutler* v. *Tufts*, 3 Pick. 277, 278. The words of a deed are to be construed most strongly against the grantor. Co. Litt. 42 *a*, 183; 2 Bl. Com. 380. A deed must be construed so as to give effect to the intent of the parties. *Worthington* v. *Hilyer*, 4 Mass. R. 205.

The evidence of the conversation between the parties was improperly admitted, to vary the effect of the writing. *Dwight* v. *Pomeroy*, 17 Mass. R. 325; *Rich* v. *Jackson*, 6 Ves. 334, note; *S. C.* 4 Bro. Ch. C. 514; 3 Stark. on Ev. 1009; *Doe* v. *Chichester*, 4 Dow, 65; *Randall* v. *Phillips*, 3 Mason, 383.

Lathrop and *Willard*, for the tenants. It is questionable whether a writ of entry can be sustained, as the tenants are
496 mortgagees, and the demandant is in the place of the mortgager, and now urging his right to redeem by a bill in equity. *Hill* v. *Payson*, 3 Mass. R. 559; *Perkins* v. *Pitts*, 11 Mass. R. 134. Even if Willard's deed were an assignment in form, it could not operate as such in this case, as it would injure the rights of subsequent mortgagees. The demandant can have no more right in this case, than Fry, the original mortgager, would have had, had he paid off this mortgage. Fry, as against the tenants, could not invest himself with the rights of a prior mortgagee; neither can an assignee of Fry. Willard's deed was a release in form, and operated as a discharge of the mortgage. *Somes* v. *Skinner*, 3 Pick. 54; *Coates* v. *Cheever*, 1 Cowen, 479; Touch. 84. The estates were merged. Co. Litt. 338 *b*; *Powell* v. *Morgan*, 2 Vern. 90; *Thomas* v. *Kemeys*, 2 Vern. 248. To construe Willard's deed as a discharge, gives effect and operation to every part of it; and so construed, the clause declaring the money to be paid in discharge of the mortgage, is not repugnant to the previous part of the

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ceed. *Sprague* v. *Snow*, 4 Pick. 54. Subsequent words may restrain the operation of previous ones. *Reade* v. *Bullock*, Dyer, 56 *b*. If a mortgager, having a bad title, purchases a good title, it enures to the benefit of the mortgagee. Pow. on Mortg. 251. And a mortgager, purchasing a first mortgage, cannot set it up against a second mortgagee. *Toulmin* v. *Steere*, 3 Mer. 210 ; 3 Wheat. 226 note ; Bull. N. P. 110 ; *Newall* v. *Wright*, 3 Mass. R. 138 ; *Bigelow* v. *Willson*, 1 Pick. 485 ; *Maundrell* v. *Maundrell*, 10 Ves. 246. The relative situation of the parties here, the demandant representing the mortgager, and the tenants being mortgagees, may be shown, to aid the construction of the instrument. *Fowle* v. *Bigelow*, 10 Mass. R. 379 ; *Leland* v. *Stone*, 10 Mass. R. 459 ; *Adams* v. *Frothingham*, 3 Mass. R. 352 ; *Sumner* v. *Williams*, 8 Mass. R. 214 ; *Whallon* v. *Kauffman*, 19 Johns. R. 104 ; *James* v. *Morey*, 2 Cowen, 284 ; *Kelly* v. *Beers*, 12 Mass. R. 387 ; *Barker* v. *Parker*, 4 Pick. 505.

If the demandant prevails, the tenants will lose every thing, as the three years for redemption have expired ; but if they prevail he will lose nothing. *Haines* v. *Beach*, 3 Johns. Ch. R. 459. 497

Ashmun, in reply, said that though a mortgager could not himself claim as assignee of a mortgage against a subsequent incumbrance under himself, yet that an assignee of the equity of redemption might acquire rights as assignee of a mortgage.

The payment of the first mortgage being made on the last day, cannot vary the rights of the parties ; as the tenants took no step to redeem, they are not injured.

The opinion of the Court was afterward drawn up by

PARKER C. J. This case is somewhat complicated, and it is necessary to unravel it before we can apply the principles which ought to decide the controversy between these parties.

Before the 29th of April, 1819, Thomas Fry and Nathaniel Fry were the owners, as tenants in fee simple, of the land in question. On that day they made their joint mortgage of it to John Gould, to secure 1500 dollars due to him. An equity of redemption was then left to the two mortgagers. On the 12th of March, 1821, Nathaniel Fry made an absolute deed of all his right to Thomas, and on the same day Thomas exe

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cuted a mortgage deed of the same premises to Nathaniel to secure the payment of 1000 dollars. In this state of the conveyances Gould was the legal owner of the land, under the joint mortgage to him above stated, with an equity or right to redeem then subsisting wholly in Nathaniel Fry, which equity was defeasible by Thomas on performance of the condition of his deed to Nathaniel. Between the two Frys their condition was the same as would have been created by a bargain and sale of the land itself, and their respective rights were the same, the land being encumbered by the mortgage to Gould. The right of Gould was transferred to Willard by deed on the 8th of February, 1825. The right of Nathaniel Fry was transferred to Joseph and Elijah Bissel, and by them to Howard and Lathrop, who entered upon the land, by consent of Thomas Fry, in December, 1823. Gould, before his assign ment to Willard, *viz.* February 27, 1824, had entered upon
498 them by virtue of his mortgage, in order to foreclose the right to redeem. His seisin under the mortgage passed to Willard, by virtue of the assignment, in February, 1825. On the 7th of January, 1824, when the sheriff's sale took place, the title stood virtually thus: — Gould was the legal owner by virtue of the mortgage, and Howard and Lathrop were the owners of the right in equity to redeem, by virtue of the conveyance from Nathaniel Fry; and Thomas Fry had a right to redeem this equity and restore himself to the right of paying off Gould's mortgage and so becoming owner of the whole land. Thomas Fry's right was then sold by the sheriff, and the plaintiff was the purchaser. What right did he acquire by the sheriff's deed? certainly nothing more than the right of Thomas Fry. which was to pay off the mortgage to Nathaniel, which had become vested in Howard and Lathrop, and then to pay off the mortgage to Gould, and he paid for this right only. Under this purchase, after the estate of Gould was vested in Willard, *viz.* on the 26th of February, 1826, the plaintiff paid to Willard the amount due on the mortgage to Gould and took from him a deed, the effect of which will be presently considered. If Thomas Fry himself, supposing his title had not been transferred, had paid the money due, it is manifest that whatever might have been the form of the deed from Willard to him, he

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could not thereby have defeated his own mortgage to Nathaniel; and it would seem to follow, that the purchaser of Thomas's right could not, merely by paying off the mortgage to Gould, secure to himself an indefeasible title notwithstanding Thomas's mortgage was outstanding, the equity purchased being that of redeeming against both mortgages, for that was all the sheriff could sell.

So if the plaintiff had merely paid the amount of the mortgage to Gould, or tendered it and then proceeded to exact his right at law or by a bill in equity, the result would have been, that he would have held the land discharged of that mortgage, but as he would come to the land only under Thomas Fry, the mortgager, whose right he had purchased, he would not thereby have acquired a right to hold the land discharged of Thomas Fry's mortgage to Nathaniel, made before the right in equity was sold.

But it is contended, that by virtue of the deed from Willard 499
to him, he became assignee of the mortgage to Gould, so that in consequence of the entry to foreclose made by Gould in 1824, the absolute title, at the expiration of three years from the time of that entry, vested in him to the entire defeat of the tenants' claim under the mortgage of Thomas Fry. The effect of which would be, not only to supplant those who were prior in right to him, but to acquire the value of this mortgage to himself without any consideration, for he is presumed to have paid for the right to redeem only what the land was worth over and above both mortgages. The law certainly would not work this mischief without the aid of the parties, and we think with such aid the attempt to produce this effect must be unsuccessful. Even if the deed produced was an assignment in terms, and so intended to be by the parties to it, if the second mortgage had been then the property of a third person not consenting, we much doubt whether the plaintiff, having knowledge of the existence of that mortgage, could defend himself in a court of equity against it. Indeed the transaction would probably be held fraudulent as against the rights of the second mortgagee.

But we are of opinion, that the deed of Willard will not admit of the construction insisted on by the plaintiff. Its

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general phraseology is that of a mere quitclaim or release,[1] and notwithstanding it contains the words *grant*, *bargain*, *sell*, &c. yet these words are to be limited and restrained by the general tenor of the context, the subject matter, and more especially by the express declaration of intent by the grantor contained in the deed itself. Words importing general covenants in a deed may be restrained by subsequent words showing a manifest intent to limit and restrain them to a particular subject. It is true, that if there is a clear and undoubted grant in the former part of a deed, and afterwards words are added which are repugnant or contradictory, the latter may be rejected; but where the words are ambiguous, or so mixed up with other words as to show an intent different from the common effect of some of the words if taken by themselves, the subsequent
500 words may be used to ascertain the real intent of the instrument. Now it is obvious and clear from the whole of the deed taken together, that the intent of the grantor was to give only a release or discharge of the mortgage. This was what he was bound to do by law, and he was bound also, in faithfulness to those for whom he held the mortgage in trust, not to give an assignment, the effect of which would be to destroy their right under the second mortgage. Even if the parol evidence were admissible, it would show no different intent on his part, and as to the intent of the grantee alone to acquire by virtue of this instrument more than he had a right to ask, it certainly could not prevail. But we are inclined to think that the parol evidence of the declarations of the parties was not competent, and ought to have been rejected. The facts and circumstances then show a right in the grantee to demand a release of the mortgage, and nothing more, and the deed given ought to have a construction which will give the plaintiff all his rights without violating the rights of the defendants.[1]

The result of our best consideration of this subject is, that the demandant must become nonsuit, and resort to his bill in

[1] As to the force and operation of a deed of quitclaim and release, see *Somes* v. *Skinner*, 3 Pick. (2nd ed.) 58, note 1; Revised Stat. *c.* 59, § 5. *Wade* v. *Howard*, 11 Pick. 296; *Carll* v. *Butman*, 7 Greenl. 102; *Dockray* v *Noble*, 8 Greenl. 278.

[1] See *Wade* v. *Howard*, 11 Pick. 295.

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equity to perfect his title by extinguishing the second mortgage; and this places him just where he could expect to stand when he purchased the equity of redemption at the sheriff's sale.[2]

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COMMONWEALTH, at the Relation of the Inhabitants of SPRINGFIELD, *versus* The COMMISSIONERS OF HIGHWAYS for the county of HAMPDEN. 501

Where a special tribunal is created by an act of the legislature, on the repeal of the act without any saving of proceedings commenced and pending before it, its whole power and authority cease, and it cannot proceed to finish what may have been so commenced.

Therefore, where an application was made to the Supreme Court to grant a *mandamus* to certain commissioners of highways, appointed under the *St.* 1825, *c.* 171, which created the office, in order to compel them to construct and finish a certain road which had been commenced under the authority of the Court of Sessions, and the Court granted a *mandamus* in the alternative ordering them either to construct the road or show cause to the contrary, and the commissioners appeared and made a return setting forth their reasons for not constructing the road, and the petitioners moved that the return be quashed for insufficiency, and a peremptory *mandamus* be issued, and pending this motion the *St.* of 1825, *c.* 171, was repealed by *St.* 1827, *c.* 77, and all the powers of the commissioners of highways vested in county commissioners; it was *held*, that all the power of the commissioners of highways to act in the business was destroyed by the repealed statute, and the *mandamus* was refused.

In such a case judgment for a *mandamus* will not be entered up as of a term preceding the passage of the repealing act.

IN pursuance of the decision of the Court reported in 4 Pick. 68, a *mandamus* issued requiring the commissioners either to cause the road in controversy to be constructed and finished, and to certify the expense of constructing and finishing the same to the Court of Sessions, or to show cause to the contrary to the Supreme Court; and to show to the Court, at the next May session in Hampden, the manner in which this command was executed. At the May term 1827, the commissioners made a return, in which they stated at length the proceedings of the town of Springfield with regard to the road, and the reasons why they could not cause the road to be construct-

[2] See *Wade* v. *Howard*, 8 Pick. 353.

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ed and finished, and certify the expenses thereof to the Court of Sessions.

At the next September term, in Hampden, the petitioners moved that the return of the commissioners should be quashed, and a peremptory *mandamus* be issued, assigning several causes which it is not necessary to specify. A motion was made by the respondents, at the same term, to quash the writ for informality.

502 The case was argued in writing by *G. Bliss* senior and *Willard*, for the relators, and *Lathrop*, for the respondents.

On February 28, 1828, and before the arguments of the counsel were completed, an act was passed, repealing the statute of 1825, *c.* 171, which provided for the creation of commissioners of highways. This act provided for the appointment of county commissioners, who were vested with all the powers of the commissioners of highways. This statute however provided, "that this act shall in no way affect any highway already adjudged by the commissioners of highways for any county to be of common convenience and necessity, or any highway already laid out or supervised and established, altered or discontinued by said commissioners, whether the same be worked or not, or any contract by said commissioners or by their direction, entered into, or any liabilities incurred, or rights accrued under the same, but the same and the remedies for enforcing them shall remain as if this act had not been passed.

Lathrop. The statute of 1827, *c.* 77, by repealing the act authorizing the appointment of commissioners of highways, has revoked the power vested in them, so far as it respects the object sought by the petitioners. No proceedings can be pursued under a repealed statute, though begun before the repeal, unless by a special clause in the repealing act. *Road in Hatfield Township*, 4 Yeates, 392. The town of Springfield had not acquired any vested rights under the former act which the legislature could not take away. Similar powers have heretofore been exercised by the legislature and sanctioned by the Court. Thus the legislature may alter the subsisting tenure of real estate; *Holbrook* v. *Finney*, 4 Mass. R. 566; or the time of limitation for suits on existing de-

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mands, *Call* v. *Hagger*, 8 Mass. R. 423 : may revoke an exemption from militia duty ; *Commonwealth* v. *Bird*, 12 Mass. R. 443 : may repeal laws prescribing the terms on which a settlement may be gained, so as to deprive a person of all rights not perfected under the law ; *Rutland* v. *Mendon*, 1 Pick. 154 ; may extend the charters of corporations, *Foster* v. *Essex Bank*, 16 Mass. R. 245 : may repeal a law so as to affect actions pending at the time of the repeal ; *Bacon* v. *Callender*, 6 Mass. R. 303 : may make new laws in relation to prison limits so as to defeat the obligation of bonds previously executed, and suits then pending, provided final judgment has not been rendered ; *Walter* v. *Bacon*, 8 Mass. R. 468 ; *Patterson* v. *Philbrook*, 9 Mass. R. 151.

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Bliss and *Willard*. The case having been continued *nisi* after a return to a *mandamus* and exceptions filed, the Court will not suffer either party to be injured thereby. *Perry* v. *Wilson*, 7 Mass. R. 393. Where a trustee who had been ordered to make further answers, refused to submit to examination and died without making any answer, judgment was given against him as of the term before his death. *Patterson* v. *Buckminster*, 14 Mass. R. 144. Every thing done under a statute is presumed to be rightly done. A repeal does not render the doings under the statute void. Viner's Abr. *Statute*, *E* 9. This may be applied to an alternative *mandamus*. They also cited 7 Co. 30 *a*, 30 *b* ; *Rex* v. *Powell*, 2 Str. 782 ; *Farrington's Case*, Cro. Car. 10 ; *Hammon* v. *Griffith*, Cro. Eliz. 583 ; *Waller* v. *Hauger*, 2 Bulst. 262 ; Viner, *Mandamus*, *C*, 2, 8. This case is distinguished from *Miller's Case*, 1 W. Bl. 451, because here there is a judgment on the point originally in controversy. In *Couch* v. *Jeffries*, 4 Burr. 2460, after verdict for a penalty for a stamp duty, an act passed to exempt from all penalties in such cases was held not to include that case, as the plaintiff, by the verdict, had acquired vested rights. As to the general doctrine of existing rights, they cited *Dash* v. *Van Kleeck*, 7 Johns. R. 477 ; *Williams* v. *Pritchard*, 4 T. R. 2 ; *Whitman* v. *Hapgood*, 10 Mass. R. 437 ; *Somerset* v. *Dighton*, 12 Mass. R. 383 ; *Medford* v. *Learned*, 16 Mass. R. 215.

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The opinion of the Court was afterwards drawn up by

PARKER C. J. The proceedings in this case have had relation to the powers vested in commissioners of highways under *St.* 1825, *c.* 171. The inhabitants of Springfield had applied to the commissioners, by petition, to construct and finish a highway which had been laid out through that town by
504 the Court of Sessions before the passing of that act, and to certify the expenses thereof to the Court of Sessions, in order that the same might be paid out of the county treasury, according to the provisions of that act. On this petition the commissioners refused to proceed as prayed, and the inhabitants, deeming their refusal illegal, petitioned this Court for a *mandamus* to the commissioners, requiring them to proceed according to the prayer of the inhabitants. At the September term 1826, of this Court, for the county of Hampden, a rule was granted against the commissioners to appear at the then next term of the Court to be held at Northampton, for the counties of Hampshire, Franklin and Hampden, at which term the commissioners appeared; and no sufficient cause being shown why a writ of *mandamus* should not go against them, such a writ was awarded in the alternative, returnable to the next term of the Court in the county of Hampden, when and where the commissioners made their return upon the writ, setting forth divers facts and circumstances justifying them, as they supposed, in refusing to construct and finish the road and certify the expenses according to the original prayer of the inhabitants; and at the next term of the Court at Northampton, in September, 1827, the inhabitants and the commissioners were partially heard by counsel, on the sufficiency of the return, but the parties wishing to be further heard thereon, the cause was continued *nisi* by consent, for arguments in writing to be interchanged and presented to the chief justice in the ensuing winter, to be laid before the Court at a meeting of the justices intended to be held at Boston, in the month of January, 1828 These arguments were not completed and presented until after the meeting of the justices was terminated, so that there was no opportunity of considering them until the March term 1828, of the Court, in Boston. Previous to this meeting the act of 1827, *c.* 77, was passed, constituting the board of county

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commissioners and repealing the act of 1825, *c.* 171, which vested all power in relation to highways in the commissioners of highways, as they were denominated in that act. And the question is, whether the "commissioners of highways" can now lawfully be compelled by *mandamus* to execute the duty assigned them under the repealed statute; or in other words, whether any power or authority remains with that body in relation to the subject matter of these proceedings, which power and authority they may be compelled to exercise.

It seems to be a settled principle, that where a special tribunal is created by act of the legislature, upon the repeal of the act without any saving clause of proceedings commenced and pending before it, its whole power and authority cease, and it cannot proceed to finish what may have been so commenced.

Miller's Case, 1 W. Bl. 451 [1]. This was a motion for a *mandamus* to the Justices of Sessions to proceed to grant Miller a discharge under the insolvent debtors' act of 1 *Geo.* 3, because the clause of the statute under which the discharge was to be given, was repealed by a subsequent statute; yet the jurisdiction had attached before the repeal, by instituting and proceeding in the suit. But the court held that nothing was more clear, than that the jurisdiction was gone, and that they could not grant a *mandamus:* and it was observed, that even offences committed against a clause while in force, could not be punished without a special clause to allow it.

And the practice of legislatures is agreeable to this principle, for whenever penal statutes are repealed, it is usual to introduce a proviso for the continuance in force of the statute, in regard to prosecutions commenced before the repeal.

And if this is a sound principle when applied to special jurisdiction over a particular subject, given to courts of general jurisdiction, whose powers in other respects remain unimpaired by the repeal of a particular statute, it must apply with at least equal force where the tribunal itself is created by the very statute which is repealed; for as all power of a judicial nature emanates from the legislature, if it is taken away from one tribunal and vested in another, no vestige of authority remains in

[1] See *S. C.* 3 Wilson, 420; Dwarris on Stat. 671.

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the former, unless by special provision or very clear implication it appears to have been the intention of the legislature that it should be continued.

It is intimated however by the learned counsel for the petitioners, who very candidly cited *Miller's Case*, that the principle adopted in it is hardly consistent with the doctrine in *Couch* v. *Jeffries*, 4 Burr. 2460; but an examination of this last case has satisfied us that there is no such inconsistency as is supposed. This was not the case of a repealed statute, but of a provision to enable persons subject to a penalty under a former statute, to avoid the penalty by doing a certain act. And the question was, whether, as the action had been tried and a verdict rendered before this exculpatory act was done, it should prevent a judgment on the verdict; and it was held that the right to the penalty had vested under the former statute, and therefore the excusing statute ought to be construed to relate only to future actions, for the words were general and ought to be so construed as to save vested rights. In the former case, of *Miller*, the jurisdiction and power of the court were taken away by the repealing statute; in the latter case, the power was left, and the question was merely one of construction.

It is also said by the same counsel, that the case before us is different from *Miller's*, because here was a judgment, and in that there was none; but there has been no judgment in this case, but only interlocutory proceedings, as there had been in that, and we cannot distinguish the two cases in principle.

We have examined very critically the statute of 1827, c. 77, to see if either by express terms or by implication we could discern any intent of the legislature to save any jurisdiction in the commissioners which will warrant us in proceeding to compel them to do what is prayed for by the petitioners, but we find no such intention. In the first section, the statute of 1825, c. 171, is expressly repealed. There is a saving proviso which shows, we think, that there was no carelessness in legislating upon this subject. Under this proviso the authority of the commissioners is continued, where they *shall have adjudicated* upon any highway, that it is of common convenience and necessity, or shall have supervised and established, altered or discontinued any highway, whether worked or not; and it is

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.nen provided that the new act shall not impair any contract made by the commissioners, or any liabilities incurred or rights accrued under the same, but the same, and the remedies for enforcing them, shall remain the same as if the act had not passed. Under this branch of the proviso the county commissioners may have authority to supervise this subject, but it is not within the power *reserved* to the commissioners of highways. Now nothing had been done by these commissioners of highways in relation to the road which is the subject of this complaint. It had been adjudged to be of common convenience by the Court of Sessions, not by them. It had not been supervised, &c. by them, nor had they made any contract respecting it. The very grievance complained of is their refusal to do any of these acts. If the legislature had intended to save from the repealing act, all complaints and processes instituted before the commissioners, touching the execution of powers vested in them by the former statute, they would have made express provision therefor.

Several cases have been cited to show that the Court will, in their discretion, sometimes enter judgment as of a preceding term, to avoid the effect of the death of a party upon the proceedings, where the cause had been continued after a hearing, and after judgment would have been entered, but for the de lay thought necessary by the Court to deliberate upon the case; and the inference is probably intended to be drawn, that a judgment may in this case be entered *nunc pro tunc*, and a peremptory *mandamus* awarded thereon. But the cases in which this discretionary power has been exercised were wholly dissimilar to this, and we do not feel authorized to extend the principle further than it has heretofore been applied. In the first place, this case was not delayed for the convenience of the Court at the time when the repealing act passed, but stood continued in the ordinary course of business for argument. This was for the convenience of the parties or their counsel. In the next place, we should, by so doing, give power and jurisdiction, by a fiction, to a tribunal which had by the act of the legislature ceased to exist, and this would be legislative power which we are not authorized to assume. Then again, 508
we should be obliged to go back not merely to the last term

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preceding the actual entry of judgment, but to a term preceding the enactments of the repealing statute, in order to avoid the effects of it.

The position that every thing *done* under a statute while in force, remains valid, though the statute may afterwards be repealed, is undoubtedly true, but goes no further than to render valid things actually done; but when those things themselves are merely preliminary, the principle does not authorize a further proceeding in order to render them effectual. So the continuance of certain legal proceedings in force, and the right to proceed further in them notwithstanding the death of the king, is only a relaxation of the harsh common law principle, that all suits are abated by the death of the king; a most despotic principle, which will not allow even the law to survive the chief officer of the law, the king.

It is said, however, that there was a vested right in the inhabitants of Springfield by virtue of the provisions of *St.* 1825, *c.* 171; a right to be reimbursed in or saved from the expense of making a highway, which before the operation of that act had not been worked and finished; and that the legislature could not divest them of that right. But there is no such thing as a vested right to a particular remedy. The legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another. *If there is a vested right*, it is not invaded by the repeal of the act which created it, for the new statute makes sufficient provision for all cases under the former statute not reserved to the old board, by providing, in the 6th section, that "wherever any highway is already laid out or altered in any county, which it would be the duty of such county to make, under the provision of law, and the working of the same is not already commenced by said commissioners of highways, or by them contracted to be made, it shall be the duty of said county commissioners to do and perform all the acts in relation to the making of the same which it would be incumbent upon the said commissioners of highways to do and perform if this act had not been passed."

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We give no opinion as to the probable success of an application to the new board, for it must be decided be

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tween other parties, and perhaps upon a different state of facts.

Under the foregoing considerations we are all of opinion, that a writ of *mandamus* to the commissioners of highways cannot be granted, as prayed for in the petition.[1]

ELISHA TILESTON *versus* ALPHEUS NETTLETON.

A promise by one person to pay for a dinner furnished for others, made while they are in the act of eating the dinner, is not binding without a note in writing, the dinner not having been originally provided at the request and on the credit of the person making the promise.

A verbal promise by A, after the commencement of the dinner, in such case, to be responsible for the dinner, is not binding, even if the plaintiff furnished it under an expectation that A would pay for it, if A had previously done nothing to authorize such an expectation.

A forbearance to collect the pay for the dinner from the persons who are eating it, though it might be a good consideration for a promise to pay for it by another person, yet it does not constitute such an original contract as would be valid without a note in writing.

THIS was an action of assumpsit to recover the price of a dinner alleged to have been furnished at the defendant's request, by the plaintiff who was an inn-keeper, for a light infantry company called the Hampden Guards, on the 4th of July, 1825.

At the trial in the Common Pleas, before *Williams* J., the following facts appeared in evidence. The defendant was the commanding officer of the company and a member of the general committee of arrangements for a public celebration on that occasion. Previous to the celebration no provision was made for a dinner for the Guards, different from that for the citizens generally. The Guards performed the escort duty on the occasion, and partook of the dinner in company with the other citizens. They did not pay for their dinners, and some of them testified that they supposed the dinner would be provided for them without expense, though they did not know who was to pay for it. 510

[1] See *Thayer* v. *Seavey*, 2 Fairfield, 286 to 290; 1 Kent's Comm. (3d ed.) 465, note *a*

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At the dinner the plaintiff directed two persons to collect the pay for the dinner, from the persons present, one dollar each, making no exception of the Guards. When they were proceeding to collect the money of the Guards, after getting it from the other persons present, the defendant told the plaintiff that he need not call on the Guards for payment, as he would be responsible for them. The plaintiff assenting to this proposal, the Guards were not called on for pay. When this took place the company were eating, and had not completed their dinner. One witness testified that he believed that the Guards, though seated at the table, had not begun to eat, when this declaration was made.

After the dinner a voluntary contribution of eleven or twelve dollars was collected from the Guards to pay for contingent expenses, such as target, uniform, &c. and for the dinner.

The defendant offered evidence tending to prove that the money thus contributed was paid into the hands of the lieutenant of the company and expended by him wholly in paying the contingent expenses, — and that no part of it came into the defendant's hands, except to pay him for money which he had advanced for the contingent expenses.

The evidence was all submitted to the jury, with instructions from the Court, substantially, as follows : —

1. That if they believed that the dinner for the Guards was provided at the defendant's request, either express or implied, and on his credit, the plaintiff was entitled to recover without any agreement in writing.

2. But if they should find that the defendant was not originally liable, and only interposed after the original liability had been incurred by others, and engaged collaterally to be responsible for the Guards, such a collateral undertaking would not be binding on him without a note in writing, as required by the statute of frauds.

3. That if the defendant was not originally liable, any promise by him, not in writing, made while the Guards were seated and in the act of eating the dinner, would not be binding.

511 4. That if the plaintiff provided this dinner for the Guards,

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without intending to look to them personally for payment, and on an expectation that the defendant would pay for the same, still, if the defendant had done nothing to authorize such an expectation, a verbal promise to be responsible for it afterwards would not be binding on him.

5. That the plaintiff's desisting from collecting his pay from the members of the Guards at the defendant's request, and suffering them to disperse after the dinner in consequence of the defendant's undertaking, though it might be a good consideration for a written contract, did not constitute such an original contract as would be valid without a note in writing.

6. That if they should believe that the money obtained by the contribution was specifically for the payment of the dinner for the Guards, the plaintiff would be entitled to recover the sum so specifically contributed by the company; but if the contributions were made generally to discharge the debts of the company for contingent expenses, and had been appropriated and paid for that purpose, the plaintiff could not recover the money so contributed, in this action.

The jury returned a verdict for the defendant, and the plaintiff filed his exceptions to the above instructions.

Per Curiam. The principles laid down by the Court of Common Pleas are certainly correct, and well maintained by the authorities cited. The true question is, was the promise of the defendant original or collateral.[1] There is no direct evidence of an original promise. The members of the company appear to have been the original debtors, and they might have been sued severally upon an implied promise; and their original liability proves that the defendant's engagement was only collateral.

Packard, for the plaintiff.

Willard and *W. Bliss*, for the defendant.

Judgment affirmed.

[1] See Roberts on Frauds, 216 to 225; *Swan* v. *Nesmith*, 7 Pick. 220; Chitty on Contracts, (3d Am. ed.) 202 *et seq*; *Elder* v. *Warfield*, 7 Harr. & Johns. 391; *Cutler* v. *Hinton*, 6 Randolph, 509; *Slingerland* v. *Morse*, 7 Johns. R. (2nd ed.) 463, note *a*; *Skelton* v. *Brewster*, 8 Johns. R. 376; *Bailey* v. *Freeman*, 11 Johns. R. 221; *Chase* v. *Day*, 17 Johns. R. (2nd ed.) 115, note *a*; 2 Stark Ev. (5th Am. ed.) 345, 346, notes.

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NOAH CLARK, in Error, *versus* EZEKIEL LAMB, Executor &c.

In an action brought in the Common Pleas by an executor, the original declaration was for money had and received by the defendant to the use of the plaintiff, as executor, and that court allowed the plaintiff to amend by adding counts for money had and received by the defendant to the use of the testator and a promise thereon to pay the executor; on an *insimul computassent* between the plaintiff as executor and the defendant, of money due to the plaintiff as executor; and for money had and received to the use of the testator, and a promise to pay the testator. Verdict and judgment for the plaintiff. On a writ of error, it was *held*, that it was not error in the Common Pleas to allow the amendments, and that after verdict and judgment the amended counts must be presumed to be for the same cause of action as the original count, as nothing appeared on the record to show that they were for different causes of action.

In the above action the defendant pleaded *non assumpsit* and *non assumpsit infra sex annos* to the whole declaration; and to the first, second and third counts, *actio non accrevit infra sex annos* to the plaintiff as executor; and to the fourth count, *actio non accrevit infra sex annos* to the testator. Issues being properly joined, the jury found "that the defendant did promise the plaintiff in manner and form, &c. within six years next before," &c. Judgment was entered on this verdict for the plaintiff. *Held*, that the verdict was not erroneous in not finding upon the issue of *non accrevit*, as the promise was not averred to be to pay at a future day; but that it was erroneous in not finding as to the promise alleged in one of the counts to pay the testator. *Held* also, that even after error brought, the verdict might be amended by the judge's minutes.

THIS was a writ of error to reverse a judgment of this Court, rendered at the September term 1827, in Hampshire, against the plaintiff in error. From the record the proceedings in the case appear as follows. The original suit was an action of *assumpsit* brought by Ezekiel Lamb, as executor of Daniel Lamb, against Clark, the plaintiff in error. The original writ contained only one count, which was for money had and received by Clark, the defendant, to the use of Ezekiel Lamb as executor. An amended declaration was filed at the return term, containing the following additional counts: 2. For money had and received by Clark to the use of the testator, and a promise in consideration thereof to pay the executor: 3. On an *insimul computassent* between Ezekiel Lamb, as executor, and Clark, of money due to Ezekiel, as executor, and a promise to pay

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him as executor: 4. For money had and received by Clark, to the use of the testator, and a promise to pay the testator.

Clark pleaded *non assumpsit* to the whole declaration; on which issue was joined to the country. He also pleaded *non assumpsit infra sex annos*, to the whole declaration. To this plea the plaintiff replied a promise within six years; on which issue was joined. To the first, second and third counts, Clark pleaded, that the causes of action did not accrue to the plaintiff in his said capacity within six years; to which the plaintiff replied, that the causes of action did accrue to him as executor within six years; on which issue was joined to the country. To the fourth count Clark pleaded, that the action did not accrue to the testator within six years; to this the plaintiff replied, that the action did accrue to the testator within six years; on which issue was joined to the country.

The jury impannelled to try the issues, returned a verdict, "that the defendant did promise the plaintiff in manner and form as he has alleged in his declaration, within six years next before the commencement of said action," and assessed the damages. A motion made by the defendant for a new trial, was overruled, and judgment entered on the verdict. (5 Pick. 193.)

The errors assigned are; — 1. That the plaintiff below was allowed to amend and did amend his declaration after the entry of the action in the Common Pleas, by filing new and additional counts for new causes of action not contained in the original declaration: 2. That the verdict, on which judgment was rendered, does not find the whole of the issue joined: 3 The general error.

Bliss and *Ashmun*, for the plaintiff in error, cited, in regard to the first error assigned, *Brigham* v. *Este*, 2 Pick. 424; *Haynes* v. *Morgan*, 3 Mass. R. 208; *St.* 1784, *c.* 28, § 14; *Prov. St.* 13 *Will.* 3, *c.* 15 (Anc. Chart. 364); *Waters* v. *Borell*, 1 Wils. 223; *Bearecroft* v. *Burnham*, 3 Lev. 347; *Cope* v. *Marshall*, Sayer, 234; *Doe* v. *Pilkington*, 4 Burr. 2447; *Phillips* v. *Bridge*, 11 Mass. R. 243; [Rand's ed. 246, note *a*;] *Colt* v. *Root*, 17 Mass. R. 229; *Regulæ Generales*, 16 Mass. R. 373; *Dean* v. *Crane*, 1 Salk. 28; *S. C.* 6 Mod. 309; *Green* v. *Crane*, (*S. C.*) Ld. Raym. 1101; *Sarell* v.

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Wine, 3 East, 409 ; *Knowles* v. *Michel*, 13 East, 249 ; *Foster* v. *Allanson*, 2 T. R. 479 ; *Trueman* v. *Hurst*, 1 T. R. 40 ; *Bartlett* v. *Emery*, ibid. 42, note ; *Codman* v. *Jenkins*, 14 Mass. R. 93, 99.

With regard to the second error assigned, they cited Co. Litt. 227 *a* ; Bac. Abr. *Verdict*, *M* ; *Finymore* v. *Sanky*. Cro. Eliz. 133 ; *Hooper* v. *Shepherd*, 2 Str. 1089 ; *Miller* v. *Trets*, 1 Ld. Raym. 324 ; *Rex* v. *Hayes*, 2 Ld. Raym. 1518 ; *Gomersall and Gomersall's Case*, 2 Leon. 196 ; *Rossé's Case*, 3 Leon. 83 ; *Patterson* v. *The United States*, 2 Wheat. 221 ; *Brockway* v. *Kinney*, 2 Johns. R. 210 ; *Van Benthuysen* v. *De Witt*, 4 Johns. R. 213 ; *Swan* v. *Wheeler*, 4 Day, 139 ; *Brown* v. *Chase*, 4 Mass. R. 436 ; *Holmes* v. *Wood*, 6 Mass. R. 1 ; *Porter* v. *Rummery*, 10 Mass. R. 64 ; *Foster* v. *Jackson*, Hob. 52 ; Com. Dig. *Pleader*, *S*, 19 ; *Grant* v. *Astle*, 2 Doug. 722 ; *Nisbett* v. *Griffith*, Sayer, 97.

Dewey and *Bowdoin*, *contrà*, as to the amendments in the Common Pleas, cited 1 Tidd, 652, 653 ; *St.* 1784, *c.* 28, § 14 ; *Leighton* v. *Leighton*, 1 Mass. R. 433 ; *Bridge* v. *Austin*, 4 Mass. R. 115 ; *Phillips* v. *Bridge*, 11 Mass. R. 243 ; *Colt* v. *Root*, 17 Mass. R. 229 ; *Harris* v. *Wadsworth*, 3 Johns. R. 257 ; *Heneshoff* v. *Miller*, 2 Johns. R. 295 ; *Burlingame* v. *Burlingame*, 7 Cowen, 92 ; *Standish* v. *Parker*, 2 Pick. 22 ; *Marlborough* v. *Widmore*, 2 Str. 890 ; Rule 31 of C. C. P. As to the alleged defect in the verdict, they cited *Tey's Case*, 5 Co. 40 ; *Shirley* v. *Lunenburg*, 11 Mass. R. 379 ; *Brigham* v. *Eveleth*, 9 Mass. R. 538 ; 1 Roll. Abr. 785 ; Com. Dig. *Pleader*, *S*, 26 ; *Bartlett* v. *Spooner*, Barnes, 461 ; *Foster* v. *Jackson*, Hob. 52 ; *Howks* v. *Crofton*, 2 Burr. 698 ; *Mackalley's Case*, 9 Co. 67 ; *Boswell* v. *Roby*, 3 N. Hampsh. R. 467.

April term 1829, *in Hampshire.*

PARKER C. J. delivered the opinion of the Court. [After stating the nature of the several counts.] The objection lies only to the fourth count, for in all the others the promise is alleged to be to the executor, and the consideration is a debt due to the testator in his lifetime. The counts are consistent with each other, and for aught appearing of record, are for the same cause of action, and they ought to be presumed so to be after verdict and judgment.

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In regard to the fourth count, the form of the averment of the promise only is changed, the consideration being the same as in the other counts, *viz.* money received by the defendant to the use of the testator. This is the only proper count, and would of itself have been sufficient. It is not however inconsistent with the others, for it may well be, that for a debt due to the testator, a promise may be made to the executor, and it is certain that an implied promise to the testator arose in law. These counts may all be joined originally, as has been repeatedly determined. *Petrie* v. *Hannay*, 3 T. R. 659; *Cowell* v. *Watts*, 6 East, 406; 2 Str. 890.

But it is said that the fourth count is for a different cause of action from that which is averred in the other counts, and therefore it was erroneous in the court to admit it to be filed in amendment of the declaration. In order to sustain this objection it should appear of record, that it was for a different cause. We think this does not appear of record, because the substantial cause of action, as it appears in the preceding counts, is the indebtedness to the testator, which indebtedness raised a promise in law to him, and a promise to the executor could only be proved by showing a debt to the testator in the manner it is alleged in the three first counts.

In regard to the count on an *insimul computassent*, as the accounting averred was between the plaintiff as executor and the defendant, the presumption in law is, that it related to demands subsisting between the testator and the defendant; so that it does not appear by the record that this was a different cause of action from the others. [1]

The principal difficulty we have met with relates to the verdict, which in terms leaves the issue upon the fourth count unanswered. This however is a fault in the form rather than in the substance of the verdict. One of the issues is upon the

[1] See *Miller* v. *Clark*, 8 Pick. 412; *Eaton* v. *Whitaker*, *ante*, 465. For other cases in which amendments will be allowed, see *Vancleef* v. *Therasson*, 3 Pick. (2nd ed.) 14, note 1; *Bishop* v. *Williamson*, 2 Fairfield, 500 to 503.

By the Revised Statutes it is enacted, that the court in which any civil action is pending, may at any time before judgment is rendered therein, allow amendments, either in form or substance, of any process, pleading or proceeding in such action, on such terms as shall be just and reasonable. *c.* 100, § 22.

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three first counts as to the promise to the plaintiff in his capacity of executor, the other relates to the fourth count, in which the promise is alleged to be to the testator. The verdict is, that the defendant promised the plaintiff in manner and form,

516 &c. which in terms excludes the other issue. If the verdict had been, that the defendant made the promise, &c. it would have covered the whole and have been sufficient. Standing as it now does, there appears to be an error, for all the issues ought to be answered by the verdict. Still it is obvious, that if there were not two demands before the jury, this is mere defect of form, and has not in any degree prejudiced the defendant. Where there is but a single issue composed of several facts, and the verdict does not affirm or negative the whole which is material, no judgment ought to be rendered, and if rendered, must be reversed. Where there are two or more issues and the verdict is perfect as to some, but silent as to others, the verdict is amendable, if by the certificate of the judge it shall appear that there was no other matter in trial except what is embraced in the issues on which the verdict is sufficient; and this may be corrected, even pending a writ of error, as was done in a case much stronger than this, *Petrie* v. *Hannay*, reported in 3 T. R. 659. In that case there were counts on promises to the executor and on promises to the testator, and the general issue and statute of limitations were pleaded. The verdict was found generally for the plaintiff on the first, and no notice taken of the last. A writ of error was brought in the House of Lords on two grounds, *viz.* that there was no verdict on the second issue, and that the two separate demands could not be joined. There was a joinder on error and a day appointed for the argument in the House of Lords The plaintiffs there obtained a rule to show cause why they should not be at liberty to amend according to the judge's notes, by adding a verdict on the second plea. As to the first, the amendment was allowed, and as to the second it was held, that the counts well lay together. This was a stronger case, because the plea of the statute of limitations, if unanswered, was a substantial defence; but without doubt it appeared by the judge's notes, that it was not sustained by evidence, and therefore the defect in the verdict was considered formal and cura-

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ble by amendment. In the case before us, if the judge shall certify, as we understand he is able to do, that there was but one demand in fact submitted to the jury, we think the verdict may be corrected, for it is evident that the jury intended to find upon the whole matter in favor of the plaintiff.[1]

ILAI GRISWOLD *versus* WARREN MESSENGER.

Where land was conveyed by a deed stating the consideration to be a sum of money received by the grantor, and the grantor afterwards brought an action to recover the value of the land, parol evidence that the actual consideration was a promise to convey to a third person, and that the grantee had refused to make such conveyance, was held to be inadmissible.

THIS was assumpsit to recover the value of certain land described in a deed from the plaintiff to the defendant, dated June 18, 1824, purporting to be made for 1100 dollars, which, as was said in the deed, had been paid to the plaintiff, and the receipt whereof he acknowledged, as in the common form of a deed.

The first count alleged that the defendant, being indebted to the plaintiff in the sum of 1100 dollars for land sold and conveyed, in consideration thereof promised to pay that sum; the second was for money had and received; the third was a *quantum valebat*.

The plaintiff proved, that having had the proceeds of real estate which belonged to his wife applied to his own use, he agreed with her to convey the land described in the deed above mentioned to a third person, for the purpose of conveying it to her; that he conveyed the land to the defendant, upon his promising to convey the same to Mrs. Griswold; that the defendant paid no consideration for the conveyance, but having got the deed recorded, claimed to hold the land for his own use, and refused to convey it to Mrs. Griswold according to his agreement.

The defendant objected to the admission of this parol evi-

[1] See 1 Harr Dig 54, 55; *Little* v. *Larrabee*, 2 Greenl. 37; *Dryden* v *Dryden*, 9 Pick. 546.

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Griswold v. Messenger.

dence; but for the purpose of ascertaining the facts it was admitted, and a verdict was found for the plaintiff. If this evidence ought to have been excluded, the plaintiff was to become nonsuit.

518 *Sept. 17th.*

J. Mills for the defendant. Our first objection to the parol evidence is, that it contradicts the deed. The consideration stated in the deed is 1100 dollars; but the evidence proves that the agreement to convey was the actual consideration. 3 Stark. Ev. 1004; *Schermerhorn* v. *Vanderheyden*, 1 Johns. R. 139; *Howes* v. *Barker*, 3 Johns. R. 506; *Maigley* v. *Hauer*, 7 Johns. R. 341.

The first and third counts set out a sale, but the proof is that there was no sale; which is a variance. 1 Chit. Pl. 299. The second count is not supported, as no money was received by the defendant.

The contract proved is within the statute of frauds. *St.* 1783, *c.* 37, § 2, 3; *Flint* v. *Sheldon*, 13 Mass. R. 448; *Boyd* v. *Stone*, 11 Mass. R. 342.

Dewey and *Blair*, for the plaintiff, contended that although the contract was originally within the statute of frauds, yet as a substantial part of it had been performed, the defendant was not at liberty to treat the whole transaction as a nullity. The statute does not declare contracts not in writing for the sale of land, and all that may be done in pursuance of them, to be void; it only prohibits actions being brought to enforce them. The action before the Court is not to compel a conveyance, but to recover the value of the land. It proceeds upon the ground, that the special contract has been rescinded. If such is the fact, it is unnecessary to set out the original contract. *Gillet* v. *Maynard*, 5 Johns. R. 85; *Towers* v. *Barrett*, 1 T. R. 136; *Kidder* v. *Hunt*, 1 Pick 328; *Badger* v *Phinney*, 15 Mass. R. 359; *Burlingame* v. *Burlingame*, 7 Cowen, 92; *Ricker* v. *Kelly*, 1 Greenl. 117.

The count for money had and received may be sustained, the land being "money's worth." *Floyd* v. *Day*, 3 Mass. R 403; *Longchamp* v. *Kenny*, 1 Doug. 137; *Randall* v. *Rich*, 11 Mass. R. 494; *Arms* v. *Ashley*, 4 Pick. 71; *Sheldon* v. *Welles*, ibid. 60. Or if not, the counts for land sold are good. 2 Chit. Pl. 7; *Shephard* v. *Little*, 14 Johns. R. 212;

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Velie v. *Myers*, ibid. 165; *Bowen* v. *Bell*, 20 Johns. R. 340; *Goodwin* v. *Gilbert*, 9 Mass. R. 514. It is settled that parol evidence is admissible to show that the consideration was not paid, notwithstanding the acknowledgment in the deed. *Wilkinson* v. *Scott*, 17 Mass. R. 249.

The case was continued *nisi* for advisement, and in the vacation the Court ordered a nonsuit, on the ground that the parol evidence was inadmissible.[1]

[1] See *Steele* v. *Adams*, 1 Greenl. 3; *Dixon* v. *Swiggett*, 1 Harr. & Johns. 252; *Brocket* v. *Foscue*, Ruffin, 64; *Evelsth* v. *Crouch*, 15 Mass. R. (Rand's ed.) 309, note *a*; *Powell* v. *Monson & Brimfield Manuf. Co.* 3 Mason, 347.

But see *Bowen* v. *Bell*, 20 Johns R. 338; *Whitbeck* v. *Whitbeck*, 9 Cowen, 266; *Sinclair* v. *Jackson*, 8 Cowen, 543; *Hamilton* v. *M'Guire*, 3 Serg. & Rawle, 355; *Weigley* v. *Weir*, 7 Serg. & Rawle, 309; *Watson* v. *Blaine*, 12 Serg. & Rawle, 131; *Belden* v. *Seymour*, 8 Connect. R. 304; *Clark* v. *Brown*, 1 Root, 77; *Hannah* v. *Wadsworth*, 1 Root, 458; *Cone* v. *Tracy*, 1 Root, 479; 1 Swift's Dig. 121, 574; *Morse* v. *Shattuck*, 4 N. Hampsh. R. 229; *Schillinger* v *M'Cann*, 6 Greenl. 364; *Emery* v. *Chase*, 5 Greenl. 232; *O'Neal* v. *Lodge* 3 Harr. & M'Hen. 433.

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ABATEMENT, PLEA IN.

The defendant in an original writ being named as of a town not within this Commonwealth, and the officer having returned that he had attached all the defendant's interest in a parcel of land, and had left a summons at the place of his last and usual abode when in the Commonwealth, the defendant, after oyer of the writ, declaration and return, pleaded by attorney, that he had no interest in the land, and prayed that the writ might abate and for his costs: — *Held*, that this was a plea in abatement, and not to the jurisdiction; that it was well pleaded by attorney; that the oyer was unnecessary, as the Court will take notice of facts appearing on the record; that the defendant was not estopped to deny that he had any interest in the land, as it was not affirmed in the return unless by inference; that the plea was valid; that the administrator of the defendant might come in to pursue the plea; and that he was entitled to recover costs. *Guild* v. *Richardson*. 364

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AGREEMENT.

1. Where the defendant sold the plaintiff a grocery store for a sum of money stated in the deed, and agreed verbally not to carry on the same kind of business within a certain distance, it was *held* to be a sufficient consideration for this agreement, that the plaintiff was thereby induced to make the purchase. *Pierce* v. *Woodward*. 206
2. Held also, that such agreement was consistent with the deed, and did not relate to the conveyance of land, and so might be proved by parol evidence. *Ibid.*
3. An agreement reciting that E and others, whose names are subjoined, purchasers of pews, &c. claim of W and others, whose names are subjoined, original subscribers to build the meetinghouse, &c. and referring the claim to arbitration, was signed by about fifty persons, and the arbitrator made an award. In an action on the agreement

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brought by some of the signers as purchasers of pews, against the others as original subscribers, it appeared on the general issue, that the defendants were also purchasers of pews, and it was *held*, that the action could not be sustained for want of proper parties. *Eastman* v *Wright*. 316

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1 In an action brought in the Common Pleas by an executor, the original declaration was for money had and received by the defendant to the use of the plaintiff as executor, and that court allowed the plaintiff to amend by adding counts for money had and received by the defendant to the use of the testator and a promise thereon to pay the executor, — on an *insimul computassent* between the plaintiff as executor and the defendant, of money due the plaintiff as executor, — and for money had and received to the use of the testator, and a promise to pay the testator. Verdict and judgment for the plaintiff. On a writ of error, it was *held*, that it was not error in the Common Pleas to allow the amendments, and that after verdict and judgment the amended counts must be presumed to be for the same cause of action as the original count, as nothing appeared on the record to show that they were for different causes of action. *Clarke* v. *Lamb*. 512

2 In the above action the defendant pleaded *non assumpsit* and *non assumpsit infra sex annos* to the whole declaration; and to the first, second, and third counts, *actio non accrevit infra sex annos* to the plaintiff as executor; and to the fourth count, *actio non accrevit infra sex annos* to the testator. Issues being properly joined, the jury found, "that the defendant did promise the plaintiff in manner and form, &c. within six years next before," &c. Judgment was entered on this verdict for the plaintiff. *Held*, that the verdict was not erroneous in not finding upon the issue of *non accrevit*, as the promise was not averred to be to pay at a future day; but that it was erroneous in not finding as to the promise alleged in one of the counts to pay the testator. *Held*, also, that even after error brought, the verdict might be amended by the judge's minutes. *Ibid.*

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ANNUITY.

See TRUSTEE PROCESS, 7, 8.

ASSIGNMENT.

1. The charter of a bank provided that the capital stock should not be sold or transferred, but should be held by the original subscriber during one year from the date of the charter; and a by-law declared the stock of each stockholder to be pledged for any sum which he should owe to the bank. Within the year a subscriber assigned his shares, and the assignee gave notice thereof to the bank, and paid the last instalment due on these shares. Afterwards, and within the year, the bank lent money to such subscriber. It was *held*, that although the assignee was not entitled to a certificate of stock in his own name, yet that the assignment was valid in equity, and that, as the money was lent after notice of the assignment, the shares were not pledged for its repayment. *Nesmith* v. *Washington Bank*. 324

2. But whether the by-law could under any circumstances create a lien

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on the shares as against the creditors of the stockholder, *quære*. *Ibid.*

3 An assignment of goods at sea and their proceeds, is sufficient to pass a legal title to the proceeds. *Hodges* v. *Harris*. 360

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The allegation in a record, that the defendant appeared by his attorney, may in general be contested, no proof being ordinarily required of the authority to act as attorney. *Hall* v. *Williams*. 232

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AWARD.

1. Where a question of boundaries was submitted by the plaintiff and defendants to arbitrators, who awarded that the plaintiff had a title to the land as far as a certain line, and that the defendants, who were in possession, should give him a release of the same, it was *held* to be no objection to the validity of the award, that it did not direct the plaintiff to give the defendants a release of the land on the other side of the line. *Jones* v. *Boston Mill Corporation*. 148

2. Where it manifestly appears by the submission, that the parties intended to leave the whole matter, law and fact, to the decision of the arbitrators, the award is conclusive, although they should have mistaken the law, unless the award itself refers the point to the consideration of the court. *Ibid.*

3. If an administrator submits to arbitration a demand against the estate of his intestate, the award will be binding upon him. *Bean* v. *Farnam*. 269

4. In debt on an award, a plea that no award was made according to the terms of the submission, is bad, inasmuch as it does not deny nor confess and avoid the award set forth in the declaration, except argumentatively. *Ibid.*

5. In cases of corruption in arbitrators, or where they exceed their authority, or commit gross mistakes in their award, the defendant may obtain relief by pleading the matter in an action on the award. — Thus a plea that the arbitrators omitted to take into consideration certain promissory notes submitted to them, is valid. So of a plea that they took into consideration matters not within the submission. *Ibid.*

6. In an action on an award, a plea that the arbitrators made a gross mistake, for that they included in the award demands not included in the submission and omitted to include others which were submitted, and in several instances made the defendant debtor twice for one and the same thing, (not specifying the claims improperly allowed or disallowed or twice allowed,) was held bad for duplicity, and also for want of certainty. *Ibid.*

7. *Nil debet* is a good plea to an action of debt upon an award. *Ibid.*

BANK.

See ASSIGNMENT, 1, 2.

BANKRUPT.

1. An assignment by commissioners of bankruptcy in a foreign country, does not operate a legal transfer of the bankrupt's property in this State, as against a creditor of the bankrupt. *Blake* v. *Williams & Tr.* 286

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2. Thus, where W, a banker in England, having advanced money to pay a bill of exchange drawn upon him by M, a citizen of this State, became a bankrupt, and after an assignment of his effects by commissioners of bankruptcy, but before notice of it had reached this country, the debt due from M, (he not having remitted funds to replace the money advanced,) was attached in his hands by virtue of our trustee process, by B, a citizen of this State and a creditor of the bankrupt, the attachment was held valid as against the assignment. *Ibid.*
3. Whether an assignment made by the bankrupt himself to the same assignees and for the same purposes, of his property here, would be valid against a subsequent attachment under the trustee process, *quære*. *Ibid.*
4. Where an insolvent debtor is discharged from his debts by virtue of an unconstitutional State bankrupt law, a creditor will not be considered to have assented to or ratified the discharge, notwithstanding he may have proved his debt under the commission and received a dividend, or have acted as one of the assignees. *Kimberly* v. *Ely*. 440
5. In an action by such creditor, any dividend received by him under the commission will be considered as a payment, *pro tanto*, of his debt. *Ibid.*

BASTARD.

1 A complaint under *St.* 1785, *c.* 66, § 2, for the maintenance of a bastard child, partakes of the nature both of a criminal and a civil suit, and in the city of Boston it is cognizable by the Police Court and the Municipal Court. *Hill* v. *Wells*. 104
2 The minute interest which the justices of the Municipal and Police Courts in Boston have, as inhabitants, in such a prosecution, does not disqualify them for taking cognizance thereof, there being no other court within the city, which has jurisdiction in such cases. *Ibid.*
3. The statute does not require that the complainant in such a prosecution shall be an inhabitant or have a legal settlement in any town in the county in which the prosecution is instituted. *Ibid.*

BETTERMENT.

See REAL ACTION, 1.

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. The holder of a promissory note, falling due on Sunday, asked the indorser, on Saturday, if it would not be best to call on the two makers, who lived about twenty miles from the holder, and who were wholly insolvent; to which he replied, that it would be of no use. On Monday it rained very hard. On Tuesday the holder made a demand on one of the makers, and took a letter from the indorser, dated on Monday, addressed to the other, stating that the indorser had been called upon to pay the note, and requesting this other maker to attend to it as soon as possible; but he had absconded, having before the note fell due made a mortgage to the indorser; which however proved to be of no value. It was *held*, that if a demand on Monday would have been seasonable, the rain furnished no excuse for not making one on that day; but it was also *held*, that the jury would be warranted in inferring that the indorser had waived a demand. *Barker* v. *Parker*. 80
2. Where a promissory note on demand, with interest under the legal rate payable semiannually, made by H & C, copartners, in the name of the firm, to C or his or-

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der, was indorsed to the plaintiff after six months, as collateral secuty for money borrowed by C, it was *held*, in an action against H, the surviving partner, that under those circumstances the plaintiff took the note subject to all the equity existing against it in the hands of C, the payee. *Thompson* v. *Hale*. 259

3 In an action by the indorsee against the maker of a negotiable note indorsed when overdue, the defendant cannot avail himself of a promissory note made to him by the payee, unless he files it in set-off, pursuant to the statute, or proves that it was given as evidence of a payment on the note in suit. *Braynard* v. *Fisher*. 355

See CORPORATION, 3, 4, 5.
PLEADING, 4.
PROMISE.

BOND.

The defendant having covenanted to pay the debts of the plaintiff with the proceeds of property assigned to him for that purpose, and to pay over the balance to the plaintiff on a day specified, the plaintiff, before that day, by an instrument under seal, agreed that this balance should be put on interest by the defendant and be expended by him for the sole benefit of the plaintiff's children, the defendant "to be under bonds for the faithful performance of the trust, and to account for and refund said balance when thereto required." The defendant tendered a bond with condition to pay the debts, to apply the balance to the support and education of the children, and to pay over in equal shares to the children any balance that might remain in his hands at the decease of the plaintiff. *Held*, that the covenant to pay the balance to the plaintiff was waived, and that the bond tendered was substantially such a one as the plaintiff had required. *M'Kenzie* v. *Rea*. 83

See FRAUDULENT CONVEYANCE, 1.

BRIDGE.

See EQUITY JURISDICTION, 1
INJUNCTION.

BY-LAW.

1. A by-law of a city is binding upon strangers coming within the territorial limits of the city. *Vandine, Petitioner, &c.* 187

2. A by-law of the city of Boston, prohibiting any person not duly licensed therefor by the mayor and aldermen, from removing the house dirt and offal from the city, was held not to be in restraint of trade, but to be a valid by-law. *Ibid*

See ASSIGNMENT, 1, 2.

CHARTER-PARTY

1. The owner of a brig, by an instrument under seal, chartered her to one L from Boston to South America and back to Boston. He covenanted to keep her in good condition, to victual and man her, and that L should load her at Boston and at Rio Grande with such goods as he should think proper, contraband excepted, and should appoint the master; in consideration of which, L covenanted to pay him in full for the freight or hire of the brig 600 dollars per month in 30 days after her return to Boston The brig sailed with a master appointed by L, and a cargo belonging to him, which was assigned during the voyage. At Rio Grande the proceeds of the outward cargo were invested in a return cargo, the bill of lading stating that the same was to be delivered to L or his assigns, at New York or Bos-

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ton, he or they paying freight for the same, and that the brig was bound to New York. Upon her arrival at New York the owner took possession of her and refused to deliver the cargo, claiming to retain it for freight. It was *held*, that he had no lien on the cargo for freight, but that his only remedy was upon the personal covenant of L in the charter-party ; and that the instrument did not cease to be binding on him by reason of the vessel's going to New York, so as to give him a right to take possession of her there and by that means acquire a right to freight on the merchandise on board. *Pickman* v. *Woods*. 248

2 A ship-master having agreed to take the defendant's schooner for the purpose of getting employ in the freighting business, engaged to actual and man her, and pay half all port charges, pilotage, &c. and the defendant engaged to pay the other half, together with eight dollars per month for one man's wages, and to put the schooner in sufficient order for the business ; and all money so stocked in the schooner, whether for freight or passage or whatever, was to be equally divided between the master and the defendant, each party accounting for the above. *Held*, that ne master was owner *pro hac vice;* hat the contract did not make him id the defendant partners ; and that the defendant was not answerable to a shipper of goods which had not been delivered according to the bill of lading. *Cutler* v. *Winsor*. 335

3. Where a vessel is chartered without any limitation of time, it is an indefeasible hiring for every voyage which she shall have undertaken before notice from the owner of his intention to put an end to the contract. *Ibid*

CONSIDERATION.

See AGREEMENT, 1.
PROMISE.

CORPORATION.

1. Where by an act creating a corporation for the purpose of erecting mill dams, it was provided that the capital stock should be divided into 5000 shares, not exceeding 100 dollars each, and that after 1000 shares should be subscribed for, a meeting of the proprietors might be called, at which any acts might be done " for the purpose of organizing the corporation, and arranging its affairs," it was *held*, that no legal assessment could be made for the general objects of the act of incorporation until all the shares should have been subscribed for; but that an assessment laid to defray preliminary expenses incurred in obtaining the act of incorporation and ascertaining the practicability and utility of the enterprise, would be valid. *Salem Mill Dam Corporation* v. *Ropes*. 23
2. *Held* also, that the subscribers were *personally* liable for such assessment, they having, after the passing of the act of incorporation, signed an agreement to pay all such legal assessments as should be made after the corporation should be organized according to the act. *Ib.*
3. The trustees of an academy incorporated " to promote morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies," were held to be capable of procuring subscriptions and taking promissory notes to constitute a fund for the purpose of founding an institution " for the classical or academical and collegiate education of indigent young

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men, with the sole view to the christian ministry," to be incorporated with the academy. *Amherst Academy* v. *Cowls*. 427

4. An assignment by the trustees of the academy of such promissory notes, to a college incorporated distinct from the academy, but by its charter authorized to receive and required to appropriate the fund in question according to the will of the donors, was held valid to transfer the notes. *Ibid.*

5 *Held*, also, that an action upon a negotiable note given as above and assigned by deed to the college, but not indorsed, was rightly brought in the name of the trustees of the academy. *Ibid.*

COSTS.

1. Where, upon an original writ against a manufacturing corporation, the officer attaches by virtue of *St.* 1808, *c.* 65, divers parcels of land belonging respectively to different corporators, he is nevertheless entitled to tax fees for only one service. *Washington Bank* v. *Boston Glass Manufactory*. 375

2. In making up a bill of costs, a party will be allowed to tax for foreign depositions such sum only as the court shall judge reasonable. *Thorndike* v. *Bordman*. 375

See ABATEMENT, PLEA IN.
MORTGAGE, 4.
PLEADING, 1.

COURTS.

1 A complaint under *St.* 1785, *c.* 66, § 2, for the maintenance of a bastard child, partakes of the nature both of a criminal and a civil suit, and in the city of Boston it is cognizable by the Police Court and the Municipal Court. *Hill* v. *Wells*. 104

2. Where, upon a petition for *certiorari*, it appeared that the proceedings upon such complaint were before and by the authority of the "Justices' Court for the county of Suffolk and of the Police Court for the city of Boston," it was *held*, that as the same persons were the justices of both of these courts, they must be presumed to have acted as justices of the Police Court, and the description of the other court might be rejected as surplusage. *Ibid.*

3. The minute interest which the justices of the Municipal and Police Courts in Boston have, as inhabitants, in such a prosecution, does not disqualify them for taking cognizance thereof, there being no other court within the city, which has jurisdiction in such cases. *Ib.*

4. The justices of the Justices' Court for the county of Suffolk have authority to establish certain days in the week as regular term days of that court, and to continue actions from term day to term day *Sawtell, Petitioner, &c.* 110

5 Where the defendant in an action in that court was defaulted in consequence of the clerk's forgetting to enter his appearance on the docket, but no judgment was entered up, it was held, that the justices had power, at their discretion, at a subsequent term day, to take off the default, and to order the cause to stand for trial. *Ibid*

6 Where a special tribunal is created by an act of the legislature, on the repeal of the act without any saving of proceedings commenced and pending before it, its whole power and authority cease, and it cannot proceed to finish what may have been so commenced. *Springfield* v. *Hampden Commissioners of Highways*. 501

7. Therefore, where an application was made to the Supreme Court to grant a *mandamus* to certain commissioners of highways appointed under *St.* 1825, *c.* 171, which cre-

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ated the office, in order to compel them to construct and finish a certain road which had been commenced under the authority of the Court of Sessions, and the Court granted a *mandamus* in the alternative, ordering them either to construct the road or to show cause to the contrary, and the commissioners appeared and made a return setting forth their reasons for not constructing the road, and the plaintiffs moved that the return be quashed for insufficiency and a peremptory *mandamus* be issued; and pending this motion the *St.* 1825, *c.* 171, was repealed by *St.* 1827, *c.* 77, and all the powers of the commissioners of highways vested in county commissioners; — it was *held*, that all the power of the commissioners of highways to act in the business was destroyed by the repealing statute, and the *mandamus* was refused. *Ibid.*

See EQUITY JURISDICTION

DEED.

1 The registry of a deed of land executed by two, but acknowledged by one only, is presumptive, if not conclusive, evidence of notice to creditors or subsequent purchasers of the other; and whether the grantors were seised as joint tenants or tenants in common of the whole land, or respectively seized of distinct parts, is immaterial. *Shaw et al.* v. *Poor.* 86

2 Where an individual, under a resolve of the legislature authorizing him to sell, by a quitclaim deed, land belonging to the Commonwealth, gave a deed in his own name as agent, and under his own seal, the deed was held valid. *Ward* v. *Bartholomew.* 409

3. *Held* also, that he did not exceed his authority by warranting the land against all persons claiming under the Commonwealth, that being no more than the legal effect of a sale. *Ibid.*

4. *Held* also, that it was not necessary to recite in the deed the particular acts which the resolve required to be performed in making the sale *Ibid*

5. A deed conveying all the lands belonging to the Commonwealth "between the old west line of S. and the east line of M. W." (adjoining towns,) is not void for uncertainty of description. *Ibid.*

See EVIDENCE, 10
SHERIFF, 6.

DEPOSITIONS.

See COSTS, 2.

DEVISE.

1. A testator directs his executor to appropriate towards the support of a school, all the income of twenty-seven shares in one bank, ten and a half in another, and fifteen in an insurance company. When he made the will, he owned just so many shares in the two banks and the insurance company, but before his death he sold his twenty-seven shares in the first mentioned bank. It was *held*, that the legacy was specific, and that the sale was an ademption *pro tanto*. *White* v. *Winchester.* 48

2. Where a testator bequeathed to his wife, "all rents in arrear on her real estates," memorandums written and signed by him were admitted in evidence, to show that he included in those terms, not merely rents unpaid by the tenants, but all the money he had ever received for rent, or otherwise, belonging to his wife, with interest. *Wadsworth* v. *Ruggles.* 63

3. If the subject of a specific legacy is in the possession of the legatee at the death of the testator, the ac-

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quiescence of the executor in such possession is sufficient to vest the property in the legatee, if there are assets enough to pay the debts, without any formal assent. *Andrews* v. *Hunneman* 126

DISCLAIMER.

See PLEADING, 1.

DISSEISIN.

1 A disseisin may be effected without the actual knowledge of the owner of the land, acts of notoriety, such as putting a fence round the land or erecting buildings upon it, being constructive notice to all the world. *Poignard* v. *Smith*. 172

2. A grant of land by the Commonwealth will pass its title, notwithstanding an adverse possession, the Commonwealth being incapable of being disseised. *Ward* v. *Bartholomew*. 409

3. Successive disseisins do not aid one another in creating a title by possession. Thus, where a disseisor conveys part of the land, and the grantee, under color of the deed, enters upon the whole, the possession of the first disseisor will not avail the grantee, in regard to the part not embraced by the deed. *Ib.*

DOWER.

See MORTGAGE, 3.

DUTIES.

The United States have a lien on goods imported, for only the duties on the specific goods, and not for other debts due from the importer. *Hodges* v. *Harris*. 360

ENTRY, WRIT OF.

See MORTGAGE, 1, 2.
REAL ACTION, 2.

EQUITY, BILL IN.

See PARISH, 2, 3, 4.
PARTNER, 3.

EQUITY JURISDICTION.

1. Under *St.* 1827, *c.* 88, giving relief in equity in cases of waste and nuisance, the Supreme Court has equity jurisdiction in regard to nuisances of a private nature; such as establishing without right a bridge so near to one before rightfully existing, as to diminish the profits accruing from tolls; there not being in such case a plain, adequate and complete remedy at law. *Charles River Bridge* v. *Warren Bridge*. 376

2. Whether in regard to some public nuisances, as where the health or comfort of a neighbourhood is affected, the Court has not similar jurisdiction, at least so far as to procure immediate relief by injunction, *quære*. *Ibid.*

3 The several statutes giving equity jurisdiction to this Court are not at variance with the 15th article of the Declaration of Rights, securing a right to a trial by jury in all controversies concerning property, (certain cases excepted,) for whenever a party shall require that any controverted fact be tried by a jury, the Court, by force of that article, will order an issue for that purpose. *Ibid*

See MORTGAGE, 6.

ERROR.

See AMENDMENT.

ESCAPE.

In *case* against a sheriff for a *voluntary* escape of a debtor committed on mesne process, the defendant may prove, in mitigation of damages, that the debtor was unable to pay the debt. *Brooks* v. *Hoyt*. 468

ESTOPPEL.

See ABATEMENT, PLEA IN.
SHERIFF, 1.

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EVIDENCE

1. Where a testator bequeathed to his wife, "all rents in arrear on her real estates," memorandums written and signed by him were admitted in evidence, to show that he included in those terms, not merely rents unpaid by the tenants, but all the money he had ever received for rent, or otherwise, belonging to his wife, with interest. *Wadsworth* v. *Ruggles*. 63
2. Where a ship insured was surveyed during the voyage and condemned as not worth repairing, and in an action upon the policy, the underwriters defended on the ground of unseaworthiness, it was *held*, that the production of the survey was not essential to the support of the action. *Mitchell* v. *New England Mar. Ins. Co.* 117
3. An ancient book of records of the town of Boston, entitled the Book of Possessions, which, although not regularly authenticated, has been preserved among the records of the town, was held (there being nothing to impeach its verity) competent and sufficient evidence to establish the ancient titles under allotments from the town. *Rust* v. *Boston Mill Corporation*. 158
4. In a writ of entry, upon the question whether the grantees of a cove, under whom the tenants derived their title, had ever claimed or taken possession of flats outside of a certain line, the tenants were permitted to give in evidence an ancient deed under which possession had been taken and continued to the present time, from such grantees to a third person, of a part of the flats so situated. *Ibid.*
5. Where the defendant sold the plaintiff a grocery store for a sum of money stated in the deed, and agreed verbally not to carry on the same kind of business within a certain distance, it was *held*, that such agreement was consistent with the deed, and did not relate to the conveyance of land, and so might be proved by parol evidence. *Pierce* v. *Woodward*. 206
6. A and B, joint owners of a chattel, sell it on a condition precedent, and make a delivery subject to the condition; which not being complied with, A sells his part to B, who replevies the chattel. *Held*, in such action, that A was disinterested, and so a competent witness. *Smith* v. *Dennie*. 262
7. Where a witness, on whose testimony a verdict was found, denied on the *voir dire*, that he had any interest in the case, newly discovered evidence of his being interested, was admitted upon an application for a new trial; and it being further proved, by similar evidence of declarations of the witness and of the prevailing party, that the witness had testified untruly, a new trial was granted. *Chatfield* v. *Lathrop*. 417
8. Where in an action of trespass *qu. cl. fr.* brought before a justice of the peace, the defendant pleads only the general issue, he cannot give evidence that the plaintiff was not in possession of the land, for that brings the title in question. *Lynch* v. *Rosseter*. 419
9. The principal debtor is not liable for the costs of an action brought by a surety against a co-surety for contribution, and consequently is not disqualified to be a witness in such action. *Leavenworth* v. *Pope*. 419
10. In a writ of entry the tenant claims under a deed from S to L of "a tract of land in South Hadley," not describing it except by reference to a deed from P to S of "a right to lay out" in a tract of common and undivided land in South Hadley or Granby, nine acres which M had conveyed to P; and the tenant proves, that nine acres

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in this tract had been surveyed to P before he made his deed to S. *Held*, that parol evidence was admissible to show that the land so surveyed was the same with the land demanded and with that intended to be conveyed by S to L. *Held*, also, that the deed to L was made sufficiently certain by reference. *Allen* v. *Bates*. 460

11. In assumpsit against several defendants as copartners, the declarations of one of them are not admissible evidence for the purpose of corroborating *primâ facie* evidence of a partnership. *Robbins* v. *Willard*. 464

12. Where land was conveyed by a deed, stating the consideration to be a sum of money received by the grantor, and the grantor afterwards brought an action to recover the value of the land, parol evidence that the actual consideration was a promise to convey to a third person, and that the grantee had refused to make such conveyance, was held to be inadmissible. *Griswold* v. *Messenger*. 517

See MALICIOUS SUIT, 1, 2, 4, 5, 6.
MORTGAGE, 10.
NEW TRIAL, 1, 2.
PARISH, 1.
SALE, 2.

EXCEPTIONS.

Exceptions will not lie to an order of the Court of Common Pleas requiring one summoned as a trustee, to answer a particular interrogatory; such order being merely interlocutory. *Piper* v. *Willard & Tr* 461

EXECUTION.

1. An officer having a joint execution against two whose several property he attached on the original writ, is not bound to levy equally, so far as may be practicable, on the property of each, but may levy on any of the property attached, without regard to a second attachment made by him at the suit of a creditor of one of the same defendants. *Parker* v. *Dennie*. 227

2. Where an officer unlawfully refuses to levy an execution upon money in his hands, the remedy is an action on the case, and not assumpsit for money had and received. *Ibid.*

See MORTGAGE, 1, 2.
PARTNER, 6, 7.
SHERIFF, 6.

EXECUTOR AND ADMINISTRATOR.

1. The statute of limitations respecting suits against an executor or administrator begins to run from the time of the defendant's accepting the trust, and not from the time of giving public notice of his acceptance. *Sewall* v. *Valentine*. 276

2. In pleading this statute, it is sufficient for the defendant to allege that he posted up notifications of his appointment "in two public places in the town," &c. without specifying the places. *Ibid.*

3. In such plea it is sufficient to allege generally, that the defendant gave a bond to the judge of probate for the faithful administration of the estate of the deceased, according to the form of law in that behalf provided, without setting out the bond. *Ibid*

4. An administrator may be examined on oath upon interrogatories, before the judge of probate, with regard to the time when he received money of the intestate's estate and the use which he has made of it, in order to ascertain whether he is liable to pay interest upon it. *Saxton* v *Chamberlain*. 422

5. A settlement of an account in the Probate Court by an administrator, in which he does not charge himself with interest on moneys received by him does not preclude a subsequent

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inquiry as to the propriety of charging him with interest, if the question of interest was not a subject of examination when the account was passed. *Ibid.*

6. If when the account was settled, the Probate Court inquired into the liability to pay interest and decided against it, the settlement, unless obtained by fraud, is conclusive against the liability. *Ibid.*
7. Where an administrator, several months after settling an account, presented a petition to the judge of probate for a commission on his disbursements, which was allowed, it was held that this was opening the account, and that omissions in it, such as not charging himself with interest for which he was accountable, might be corrected. *Ibid.*
8. Where an administrator appointed here takes out letters of ancillary administration in another State, and thereupon collects debts of citizens of such State, and sells land there situate, the administration of such assets is not covered by his bond given here, but he will be presumed to have rightly accounted for the same in such other State. *Hooker* v. *Olmstead.* 481
9. But moneys received in another State, of debtors living here, are to be accounted for in this State. *Ibid.*
10. Where, in an action on an administration bond, a forfeiture was confessed and the parties were heard in chancery, it was *held*, that the execution against the administrator might include sums received by him since the commencement of the action. *Ibid.*

See INSOLVENT ESTATE, 1, 2, 3
POOR, 2, 3.

FLATS GROUND.

1. The owner of land bordering on a cove where the sea ebbs and flows, who is entitled, under the colony ordinance of 1641, to the adjoining flats "to the low-water mark," can not always claim the flats in the direction of the exterior lines of his upland, but only in the direction towards low-water mark from the two corners of his upland at high-water mark. *Rust* v. *Boston Mill Corporation.* 158
2. Thus, in the case of a circular cove in which there is no natural channel, if a straight line across the mouth of the cove is 100 rods in length and the circular line of high-water mark is 200, each owner of a lot abutting on the cove is entitled to run his lines from the two corners of his lot in a direction towards low-water mark, so as to include a parcel of flats, which at the mouth of the cove will be one half the width of the lot at high-water mark; and thus each will hold his share in severalty. *Ibid.*

FOREIGN JUDGMENT.

1. In an action of debt upon a judgment of a court of record of another of the United States, *nul tiel record* is a proper plea; and the issue is to be tried by the court alone, so that the plea should conclude with a verification, and not to the country. *Hall* v. *Williams.* 232
2. If the record of such judgment states that the defendant had notice of, or appeared in defence to, the action, it seems that he cannot contradict it by a plea and issue to the country thereon; but if notice or appearance is not alleged in the record, he may avoid the effect of the judgment, here, by showing that he was not within the jurisdiction of the court by which it was rendered. *Ibid.*
3. Where in the record of such a judgment against W and F it appeared from the officer's return, that no process had been served on F, and that the plea was filed by one G as attorney to W, and the record did not allege that F had

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ever been within the State where the judgment was rendered, it was *held*, that a recital by the clerk before the entry of the judgment, stating that "W and F came by their said attorney," &c. could not be taken to be an assertion of record that F appeared to the action. *Ibid.*

4. It was likewise *held*, that the plaintiff could not amend his declaration by striking out the name of F, for the judgment being entire, if it was a nullity with respect to one of the defendants, it was so in the whole. *Ibid.*

5. It *seems*, that in an action of debt upon such a judgment, the defendant may, under a plea of *nil debet*, show that the court rendering the judgment had no jurisdiction over his person. *Ibid.*

6 A judgment recovered in another of the United States against a citizen of Massachusetts, who at the commencement and during the pendency of the action was not within such State, and never was served with process, nor ever appeared to the action, though he had knowledge of its being commenced, is not binding upon him in Massachusetts. *Woodward* v. *Tremere.* 354

FRAUD.

See SHIP, 3.
TRUSTEE PROCESS, 5, 9

FRAUDS, STATUTE OF.

1. A promise by one person to pay for a dinner furnished for others, made while they are in the act of eating the dinner, is not binding without a note in writing, the dinner not having been originally provided at the request and on the credit of the person making the promise. *Tileston* v. *Nettleton.* 509

2. A verbal promise by A, after the commencement of the dinner, in such case, to be responsible for the dinner, is not binding even if the plaintiff furnished it under an expectation that A would pay for it, if A had previously done nothing to authorize such an expectation. *Ibid.*

3. A forbearance to collect the pay for the dinner from the persons who are eating it, though it might be a good consideration for a promise to pay for it, by another person, yet it does not constitute such an original contract as would be valid without a note in writing. *Ibid.*

See EVIDENCE, 12.

FRAUDULENT CONVEYANCE.

1. Where the owner of real and personal estate gave a bond with condition that he would convey the same to the obligee, when certain negotiable notes given for the consideration should be paid, and that the obligee should have the possession and enjoyment of the property so long as he should continue to pay the notes as they became due and no longer, and possession was delivered immediately pursuant to the bond, it was held that the transaction was not fraudulent *per se* as against the creditors of the obligee. *Ayer* v. *Bartlett.* 71

2. Such possession and use, though they might induce persons to trust the obligee under the belief that he was the owner of the property, yet, if not permitted with a fraudulent design to obtain credit for him, would not render the property liable for his debts. *Ibid*

FREIGHT.

See CHARTER-PARTY, 1.

GRANT.

In the case of an ancient grant of "all that cove *already bounded*," &c. it was held, that in the absence of all proof of ancient bounds supposed to be referred to, the grant

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must operate according to the general description of the estate granted. *Rust* v. *Boston Mill Corporation.* 158

See PARISH, 5.

HIGHWAY.

See WAY.

HUSBAND AND WIFE.

Where a feme covert, whose husband by his cruelty drove her from his house without providing any means for her support, came to this Commonwealth and maintained herself here for more than twenty years as a single woman, the husband having always been a citizen of and resident in another of the United States, and having since her expulsion married and cohabited with another woman, it was *held*, that she was entitled to sue as a feme sole. *Abbot* v. *Bayley.* 89

See MORTGAGE, 3.

INJUNCTION.

Upon a bill in equity filed by the proprietors of a toll bridge built many years ago under authority from the legislature, praying for an injunction to restrain the defendants from erecting another bridge so near as to interfere with the plaintiffs' franchise, the Court refused to grant a temporary injunction before a hearing on the merits, on the grounds, — that the defendants likewise professed to act under authority from the legislature, and denied the exclusive right of the plaintiffs to the extent claimed by them, — and that the injury which the plaintiffs might suffer by the delay was not in its nature irreparable. *Charles River Bridge* v. *Warren Bridge.* 376

See MORTGAGE, 6, 7
NUISANCE, 2.

INSOLVENT ESTATE.

1. A judge of probate has authority within eighteen months from the granting of a commission of insolvency, to extend the time for creditors to present their claims, notwithstanding the report of the commissioners may have been made and accepted. *Walker* v. *Lyman's Administrators.* 458
2. Where a judge of probate refuses the petition of a creditor praying for such an extension, an appeal will lie. *Ibid.*
3. Where an attorney, having collected money for a client who lived out of the Commonwealth, died, and the client, upon hearing of the death, used due diligence to have his claim presented against the estate, but found that a commission of insolvency had been granted and a report of the commissioners had been made and accepted, but no decree of distribution had been passed, and eighteen months had not elapsed from the granting of the commission, it was *held*, that the commission ought to be reopened, in order that he might have an opportunity of laying his claim before the commissioners. *Ibid.*
4. Where a creditor of an intestate estate represented insolvent, had his whole claim allowed by the commissioners, notwithstanding it was partially secured by a mortgage, and received a dividend upon the whole, he was held to have waived his security by the mortgage. *Hooker* v. *Olmstead* 481

See BANKRUPT.
PARTNER, 2, 3, 4.
PLEADING, 4.

INSURANCE.

1. Where a ship insured was surveyed during the voyage and condemned as not worth repairing, and in an action upon the policy, the under-

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writers defended on the ground of unseaworthiness, it was *held*, that the production of the survey was not essential to the support of the action. *Mitchell* v. *New England Mar. Ins. Co.* 117

2 The owner of goods insured cannot abandon on account of the vessel's being disabled in the course of her voyage, if upon the whole it is reasonable, taking into view the nature of the voyage and the time, expense and risk of sending on the cargo, that the master should procure another vessel for that purpose, although he should not be able to do it at the port of distress or one contiguous, and although it should be necessary to make use of land carriage to reship the goods. *Bryant* v. *Commonwealth Ins. Co.* 131

3 Insurance on coffee, sugar and tea from Havana to Castine in Maine. On the 28th of December the vessel stranded at the Washwoods, on the coast of Virginia, about 40 miles from Norfolk, and the goods were landed without damage. The assured received a letter from the master on the 8th of January, relating the accident, and on the same day an abandonment was tendered but refused. The master, without waiting to hear from the assured, on the 11th of January sold the goods on the beach for 11,544 dollars. The invoice value was about 11,850. The duties paid by the master (5,390 dollars), the wreck-master's commissions on the sales (577), and the expense of saving the goods (300), amounted to 6,267 dollars. The goods might have been carried to Norfolk by land in three or four days after the accident, and thence shipped in another vessel to the port of destination, for 3859 dollars, but the master made no attempt to send them on. It was considered that the loss was not affected by the duties and it was *held*, that the master was not authorized to make the sale, and that the assured had no right to abandon, as the expenses of saving the goods and sending them on to the port of destination would have been less than fifty per cent of the invoice value. *Ibid.*

4. A usage for the master of a vessel stranded, to sell the cargo without necessity, is void. *Ibid.*

5. Claims for a general average loss and a total loss may be joined in one count. *Ibid.*

6. Where a policy provided that a loss should be paid in sixty days after proof and adjustment thereof, and the assured gave notice of a total loss more, and of a general average loss less, than sixty days before bringing his action, it was *held*, that in respect to the general average loss the action was premature. *Ib*

7. Insurance on goods from Boston to Terceira, and at and from thence to port of discharge in the United States, a quarter per cent to be added to the premium for every other port used in the Western Islands. The vessel, without going to Terceira, went immediately to Graciosa, another of the Western Islands, where a loss happened. *Held*, that there was no deviation. *Hale* v *Mercantile Ins. Co.* 172

8. Insurance against fire was made on stock in trade, consisting of cutlery and jewelry, contained in a store. A fire happening in the neighbourhood, the insured, with the approbation of the insurer, procured blankets and spread them on the outside of the store, whereby the building and its contents were preserved, but the blankets were rendered worthless. *Held*, that this loss was not covered by the policy, but that it was a subject of general average, to which the insurer and insured should contribute in proportion to the amount which they respectively had at risk in the store and its contents *Held*, also, that

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buildings in the neighbourhood, which would have been endangered if the store had taken fire, and upon some of which the same underwriters had made insurance, were too remotely affected to be liable to contribution. *Welles* v. *Boston Ins. Co.* 182

9 A vessel was owned by the plaintiff, the master, A and B, one quarter each, and the plaintiff effected insurance upon her in his own name for whom it might concern, for six months. Before she sailed, he gave a power of attorney to one P to sell his quarter, and in a subsequent letter of instructions, he and A authorized P and the master to sell their respective quarters after the delivery of the outward cargo. After such delivery a bill of sale under seal of the two quarters belonging to the plaintiff and B, was made by P alone to the master for himself and A, and the master drew bills upon A in favor of the plaintiff and B for the purchase money, which were protested for non-acceptance. The vessel was lost after the sale and within the six months, but the loss was not known until after the bills had been protested. In an action on the policy by the plaintiff for the benefit of all the assured, it was *held*, that as A repudiated the sale, and the ratification, if any, on the part of the plaintiff and B, must have proceeded on the ground that A was a joint purchaser with the master, the sale was entirely invalid, and so the ownership of the vessel remained the same at the time of the loss as at the date of the policy :— *Copeland* v. *Mercantile Ins. Co.* 198

10. Also, that a revocation by the master, pending the action, of the plaintiff's authority to claim indemnification for the master's quarter part of the loss, did not affect the plaintiff's right to recover in this action for the other three quarters : — *Ib.*

11. And that he might so recover under counts alleging respectively, that the insurance was made for the benefit of one of the owners and that he was interested to the whole amount insured. *Ibid*

INTEREST.

See EXECUTOR, &c., 4, 5, 6, 7

JURISDICTION.

See COURTS, 1, 3.
FOREIGN JUDGMENT, 2, 5

JURY

See EQUITY JURISDICTION, 3

JUSTICES' COURT.

See COURTS, 2.

LEGACY.

See DEVISE.

LEGISLATURE.

See DEED, 2, 3, 4.
DISSEISIN, 2.

LIEN.

Where two persons build a ship together, to be owned by them in certain proportions, and one advances more than his proportion of the expenses, he has no lien on the ship for the balance due to him, but the interest of the other in the ship, at least to the extent of his advances, is liable to attachment at the suit of other creditors. *Merrill* v. *Bartlett* 46

See ASSIGNMENT, 1, 2.
CHARTY-PARTY, 1.
DUTIES.

LIMITATIONS, STATUTE OF

The statute of limitations cannot be pleaded in bar to an action upon an open account "concerning the trade of merchandise, between merchant and merchant," although

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none of the items come within the six years. *Bass* v. *Bass*. 362

See AMENDMENT, 2.
EXECUTOR, &c. 1, 2, 3.

MALICIOUS SUIT.

1 T having been a partner in trade with P, and the firm having occupied a store belonging to the heirs of one on whose estate T was administrator, T brought an action for money had and received against P to recover a general balance, and likewise actions in the names of the heirs, but without their knowledge, against P and himself for rent. All these suits were submitted to arbitrators, with an agreement that they should consider the rent as having been paid by T, and they awarded that a certain sum was due to him. In an action by P against T for bringing these suits alleged to be malicious, it was *held*, that P, in order to prove malice, might show that nothing was due from him in the first suit as the partner of T. *Pierce* v. *Thompson*. 193

2 *Held*, also, that the submission and award were not conclusive evidence of probable cause for bringing the several suits, nor of a waiver of P's right to sue for damages on the ground of their being malicious. *Ibid.*

3. A witness having testified at the trial, that the partnership books were incorrect, T moved that an auditor should be appointed to audit the accounts, which motion was overruled. *Held*, that this was a matter within the discretion of the judge, and consequently that the refusal of the motion was no ground for setting aside the verdict. *Ibid.*

4 *Held*, also, that although where there are mutual dealings, if one party has not an opportunity of knowing both sides of the account, he may, to effect an adjustment, sue on the debit side, without regard to the credits, yet that in the case of a partner who may examine the books, such a proceeding, accompanied with an attachment of property, may be evidence that the suit was malicious. *Ibid.*

5. *Held*, also, that the several suits brought by T were not to be taken together as one, and therefore that a balance being found due to him upon them all collectively, did not disprove malice. *Ibid*

6. *Held*, also, that T, being administrator, might be considered as having implied authority to institute the suits for rent, if his purpose was fair and honest; but that these suits, although they were not groundless, yet if they proceeded from malice, would sustain an action by P against T for malicious suits. *Ibid*

MEETINGHOUSE.

See PARISH 1, 2, 6, 7

MILL

Where the legislature authorized a corporation to build across a navigable river a mill-dam of a given height, and to keep up the same head of water throughout the year, but provided no remedy for any person whose lands should be thereby injuriously flowed, it was held, that the remedy must be by an action at common law, and not by a process under *St.* 1795, *c.* 74, respecting mills. *Cogswell* v. *Essex Mill Corporation*. 94

MORTGAGE

1 The purchaser of an equity of redemption sold by the sheriff on execution, obtains by the sale a seisin of the land, unless the mortgager is disseised at the time of the sale; in which case he obtains only a right of entry, and in order to maintain a writ of entry counting upon his own

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seisin, he must actually enter. *Poignard* v. *Smith*. 172
2. But whether he might not, without an entry, maintain an action by declaring specially upon the seisin of the mortgager, *quære*. *Ibid.*
3. A husband purchases land, and at the same instant mortgages it to the grantor; he afterwards mortgages to another person, his wife releasing her dower, pays off the first mortgage, and dies. *Held*, that the widow had a right of dower, subject however to the last mortgage. *Walker* v. *Griswold*. 416
4. Where a mortgagee, upon being requested by the mortgager to state an account of the money due on the mortgage, renders such an account without any unreasonable delay, giving all the information in his power, he will not be liable to the costs of a bill to redeem, under *St.* 1821, *c.* 85, § 1, although some items in the account should prove erroneous: nor, if the bill is sustained, will he be entitled to recover costs. *Whitwood* v. *Kellogg*. 420
5. A mortgagee who has not taken possession of the mortgaged property, and become accountable for rents and profits, is not a trustee for the mortgager. *Hunt* v. *Maynard*. 489
6. Therefore, this Court, under *St.* 1817, *c.* 87, which gives it authority "to hear and determine in equity, all cases of trust arising under deeds," has no jurisdiction of a bill in equity brought by the assignee of the mortgager, in order to obtain an injunction against the mortgagee's proceeding at law to recover possession of the mortgaged property, and to have the mortgage deed cancelled. *Ibid.*
7. *It seems*, that a court of equity would not prevent a mortgagee from proceeding at law to recover possession of the mortgaged property on the ground of a parol agreement made by him with the assignee of the mortgager, that the assignee should hold the land discharged from the mortgage. *Ibid*
8. Where the purchaser of an equity of redemption of land which is subject to two mortgages, pays and takes an assignment of the first mortgage, *it seems*, that he does not thereby acquire the rights of an assignee of the first mortgage, but that the first mortgage is discharged. *Wade* v. *Howard*. 492
9. A purchased on execution the equity of redemption of land which was subject to two mortgages; he then paid the first mortgage and took from the mortgagee a deed purporting to "release, grant, bargain and sell" the mortgagee's interest in the land, and adding, "the aforesaid sum having been this day paid me in discharge of said mortgage." In a writ of entry by A against the second mortgagee to obtain possession of the land, it was *held*, that the deed to A was not an assignment, but a discharge of the first mortgage. *Ibid*
10. Parol evidence is not admissible in such a case to show the intentions of A in receiving, or of the first mortgagee in giving, such a deed. *Ibid.*

See INSOLVENT ESTATE, 4.

MUNICIPAL COURT.

See COURTS, 1, 3.

NEW TRIAL.

1. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative in relation to facts testified at the trial. *Gardner* v. *Mitchell*. 114
2. In an action for a breach of warranty on the sale of oil warranted to be of a fair merchantable quality, each party introduced the testimony of witnesses who had examined the oil, and a verdict was found for the plaintiff. On a mo-

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tion for a new trial on the ground of evidence newly discovered, of the plaintiff's admission that the oil was of the proper quality, this was held to be a new fact and not cumulative, and the evidence at the trial being nearly balanced, a new trial was granted. *Ibid.*

Where a witness on whose testimony a verdict was found, denied on the *voir dire* that he had any interest in the case, newly discovered evidence of his being interested was admitted upon an application for a new trial; and it being further proved, by similar evidence of declarations of the witness, and of the prevailing party, that the witness had testified untruly, a new trial was granted. *Chatfield* v. *Lathrop.* 417

1. It is not a ground for a new trial, that the judge, after having summed up the cause, instructed the jury, on motion of counsel, upon a point arising out of the facts in the case but not previously suggested, such course of proceeding being a matter within the discretion of the judge; but if the losing party might have produced material evidence on such point, in case it had been earlier presented, he has a remedy by petition for a new trial. *Sawyer* v. *Merrill.* 478

NONSUIT

A plaintiff cannot be nonsuited against his consent, if he insists on his right to appear, when called. *Semble.* *Mitchell* v. *New England Mar. Ins. Co.* 117

NOTICE.

See CHARTER-PARTY, 3.
DISSEISIN, 4.
WAY, 5, 6, 7, 8.

NUISANCE.

1. Under *St.* 1827, *c.* 88, giving relief in equity in cases of waste and nuisance, this Court has equity jurisdiction in regard to nuisances of a private nature; such as establishing without right a bridge so near to one before rightfully existing, as to diminish the profits accruing from tolls; there not being in such case a plain, adequate, and complete remedy at law. *Charles River Bridge* v. *Warren Bridge.* 376

2. Whether in regard to some public nuisances, as where the health or comfort of a neighbourhood is affected, the Court has not similar jurisdiction, at least so far as to procure immediate relief by injunction, *quære.* *Ibid*

OFFICER.

See COSTS, 1.
EXECUTION, 1, 2.

PARISH.

1. Some of the inhabitants of a parish in the town of G being universalists and members of an independent society in another part of the town, it was voted, at a parish meeting in 1802, that the independent society build a meetinghouse, according to their town valuation, with the parish, and use it in the same proportion The house was built accordingly, and the societies apportioned the time in which each should occupy it; and for two years it was occupied agreeably to such apportionment; afterwards the independent society were excluded. The house was built on land granted by the commoners of the town in 1724, "to P, T, and B, and the rest of the neighbourhood, &c. for the use of a school forever;" and this land was for more than 40 years in the exclusive possession of the parish An instrument, signed and sealed by the members of the independent society who had joined in building the meetinghouse, containing the terms of the agreement, as the plaintiffs alleged, and which they

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said had been accepted by a vote of the parish in 1802, was offered to the parish in 1805 for their acceptance, but was rejected. In 1821, the plaintiffs, (two only of whom were subscribers to the written agreement,) with other persons, formed themselves into a separate universalist society. Upon a bill in equity against the parish to compel them to perform the written agreement, it was *held* ; —

That parol evidence was inadmissible, to prove that this agreement had been acceded to by the parish, no vote to that effect appearing on the parish records : — *Manning et al.* v. *Fifth Parish in Gloucester.* 6

2 That the suit could not be sustained by the plaintiffs for the benefit of themselves and others of the universalist society, as it did not appear that they were successors or legal representatives of the independent society, nor for the benefit of the plaintiffs as subscribers of the agreement, as all of them were not subscribers : — *Ibid.*

3 That if the agreement were considered as an executory contract not involving a trust, a specific performance could not be decreed under *St.* 1817, *c.* 87, as the contract was made before the passing of the statute ; and if considered as involving a trust, the trust did not arise under a deed, the vote of the parish not being a deed, nor equivalent to a deed, and so was not within the equity jurisdiction given by that statute to this Court in regard to trusts : — *Ibid.*

4 That if the grant of the commoners was by a deed of trust, the trust could not be enforced under this bill, in which the trust set forth was not alleged to spring from that grant : — *Ibid.*

5. That if the persons named in the grant took jointly or in common with those in the neighbourhood, the plaintiffs, upon showing a title under the grant, would hold in common with individuals, and not with the parish in its corporate capacity : — *Ibid.*

6. And that the parties were not tenants in common of the meeting-house, because it was built at their joint expense and for their common benefit, but that it belonged to the parish alone, they having the title to the land. *Ibid.*

7. A town which acts also as a parish, may raise money to repair a meeting-house as a compensation for the use of it for municipal purposes, or to pay a sexton for ringing the bell for town meetings, but such design should appear in the vote ; for *prima facie*, money to repair a meetinghouse, or for the pay of a sexton, is for parochial and not municipal purposes, and cannot be assessed on such inhabitants as are not members of the parish. *Woodbury* v. *Hamilton.* 101

PARTNER.

1. Where in an action between partners to recover the balance due from the defendant upon the dissolution of the firm, the plaintiff obtained a verdict, but it appeared at the trial that there was one debt against the firm which had not been paid, the plaintiff was nevertheless permitted to take judgment, upon releasing to the defendant the amount of that debt. *Brinley* v. *Kupfer.* 179

2. Where a claim filed by the plaintiff before commissioners of insolvency upon the estate of an intestate, was rejected because he was a dormant partner and so liable to the other creditors, but he did not thereupon give notice, within twenty days, of his intention to prosecute an action at common law, and it afterwards appeared that the assets were more than sufficient to pay the other creditors, it was *held*, that he could

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not maintain an action of assumpsit against the administrator for the general balance due to him. *Johnson* v. *Ames*. 330

3 But it *seems*, that he would have a remedy by a bill in equity. *Ibid.*

4 Whether the commissioners might not have received the claim and reported the special circumstances of it, so that it might be allowed or not, as the situation of the estate would justify, *quære*. *Ibid.*

5. Whether a dormant partner is entitled, upon the death of the active one, to take possession of the partnership effects and settle the partnership concerns, *quære*. *Ibid.*

6. In the case of a dormant partnership, an attachment of the stock in trade in the hands of the ostensible partner, in a suit against him alone, has preference to a subsequent attachment of the same goods by another person in an action against the partners. *Lord* v. *Baldwin*. 348

7. Where the stock in trade in a shop occupied by A, was attached first by B and then by C, in suits against A alone, and each recovered judgment and took out his execution, and afterwards, in a suit by D against A and B jointly, the jury found that B was a dormant partner of A, it was *held*, nevertheless, that C was not entitled to have his execution levied on the property in preference to B's execution, for that B was not estopped, except in the suit of D, to deny the copartnership. *Ibid.*

8. Where C furnished money to D to be employed in trade, either by D alone, or in partnership with a third person, the net profits to be equally divided between C and D, and D entered into partnership with B, it was *held*, that as between C and D this was only a loan, though as to creditors dealing with D they would have been considered partners; but that B, who, before he entered into partnership, knew the nature of the transaction between C and D, was not entitled to claim against C as a partner of D. *Bailey* v. *Clark*. 372

9. B, as surviving partner of D, erroneously supposing the firm to be solvent and indebted to D, paid money to C on account of his claim against D, and thereupon took a receipt for the same of D's administratrix, and she took one of C. *Held*, that B's remedy to recover back the money as paid by mistake, was against the administratrix, and not against C. *Ibid.*

10. In *assumpsit* against several defendants as copartners, the declarations of one of them are not admissible evidence for the purpose of corroborating *primâ facie* evidence of a partnership. *Robbins* v. *Willard*. 464

See BILL OF EXCHANGE, &c. 2
CHARTER-PARTY, 2.
MALICIOUS SUIT.
PRINCIPAL AND AGENT, 6.
SHIP, 2.

PAYMENT OF MONEY INTO COURT

1. Paying money into court upon a *quantum meruit* count, is an admission of the contract as alleged. *Huntington* v. *American Bank*. 340

2. Where by the vote of the directors of a bank, the plaintiff was appointed special director, to receive such compensation as "should in the opinion of the board be reasonable and fair," and he declared for a reasonable compensation in a *quantum meruit* count, and the defendants paid into court the amount voted by the directors to be a "reasonable compensation," it was *held*, that by paying the money into court, the defendant waived this limitation of the contract. *Ibid*

PLEADING.

1. To a plea of disclaimer, in a writ of entry, the demandant replied,

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that at the time of the purchase of the writ, the tenant claimed to have title by virtue of a deed from a collector of taxes; and upon special demurrer, because it was not alleged that the tenant ever had possession, the replication was adjudged bad, and the tenant recovered costs. *Favour* v. *Sargent*. 5

2. The plaintiff having declared, "that the defendant, administrator, &c. being indebted for money had and received by the intestate, promised," &c. — amended by declaring, that "the intestate being indebted for money had and received by him, promised," &c. *Held*, that the amendment was for the same cause of action as the original count. *Eaton* v. *Whitaker*. 465

3. Where an action was brought up by a demurrer in the Court of Common Pleas, the defendant having liberty to waive his plea and plead anew as of the first term, it was *held*, that he could not plead in abatement the insufficiency of the service, but that he must plead to the merits. *Ibid.*

4. Where a note payable at a day not yet arrived is laid before commissioners on an insolvent estate and disallowed, and thereupon a suit is brought against the administrator, pursuant to *St.* 1784, *c.* 2, it is not sufficient to declare generally as upon a debt already due, but the declaration should set forth the note as it is, and the proceedings before the commissioners, notice, &c. *Ib.*

See Abatement, Plea in.
Award, 4, 5, 6, 7.
Courts, 2.
Evidence, 8.
Executor, &c. 2, 3.
Foreign Judgment, 1, 2, 3.
Insurance, 5.
Parish, 4.

POLICE COURT.

See Courts, 1, 2, 3.

POOR.

1. Where a stranger was received and entertained by an inhabitant of a town, previous to April 10, 1767, and his residence there was designedly concealed, so that the town officers had no opportunity to warn him to depart, it was *held*, that he did not gain a settlement. *Newbury* v. *Harvard*. 1

2. Where overseers of the poor, upon the decease of a pauper, take possession of his effects, pursuant to *St.* 1817, *c.* 186, § 6, and administration is not taken out within thirty days from his decease, they may sell so much of the property as shall be necessary to repay the expenses incurred for such pauper, notwithstanding the appointment of an administrator before the sale takes place. *Haynes* v. *Wells*. 462

3. In trover by the administrator of a pauper against the overseers, for articles fairly sold by auction pursuant to that statute and purchased by one of the overseers himself, the purchase was held not to be invalid. *Ibid*

PRACTICE.

1. A plaintiff cannot be nonsuited against his consent, if he insists on his right to appear, when called. *Semble*. *Mitchell* v. *New England Mar. Ins. Co.* 117

2. Where in trespass *de bonis asportatis* the defendant pleaded the general issue, and filed a brief statement alleging that as an officer he attached the goods as the property of a stranger, it was *held*, that the plaintiff was entitled to the opening and closing argument before the jury, notwithstanding the defendant admitted at the outset that the property was once in the plaintiff and assumed the burden of proving a transfer to such stranger. *Ayer* v. *Austin*. 225

3. The Court will not upon motion

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set aside a plea of a release of the action by a co-plaintiff, on the ground that it was collusively obtained, for the question of collusion must be tried by the jury. *Eastman* v. *Wright*. 316

See EXECUTOR, &c. 10.
MALICIOUS SUIT, 3.
NEW TRIAL, 4.
PARTNER, 1.
PAYMENT, &c., 1, 2
PLEADING, 3
WAY, 12.

PRINCIPAL AND AGENT.

1. A vessel was owned by the plaintiff, the master, A and B, one quarter each; and the plaintiff effected insurance upon her in his own name for whom it might concern, for six months. Before she sailed, he gave a power of attorney to one P to sell his quarter, and in a subsequent letter of instructions he and A authorized P and the master to sell their respective quarters after the delivery of the outward cargo. After such delivery a bill of sale, under seal, of the two quarters belonging to the plaintiff and B, was made by P alone to the master for himself and A, and the master drew bills upon A in favor of the plaintiff and B for the purchase money, which were protested for non-acceptance. The vessel was lost after the sale and within the six months, but the loss was not known until after the bills had been protested. In an action on the policy by the plaintiff for the benefit of the assured; —

It was *held*, that the power of attorney to P alone was revoked by the subsequent letter of instructions to him and the master; — *Copeland* v. *Mercantile Ins. Co.* 198

2. That a sale in pursuance of such instructions must be made by the master and P jointly; — *Ibid.*

3. That the deed of sale being in the name of P, and signed "P, attorney to C" (the plaintiff), was insufficient in point of form; — *Ibid.*

4. That the master, being an agent to sell, could not himself be the purchaser, and so nothing passed to him by the sale; — *Ibid.*

5. That as A repudiated the sale, and the ratification, if any, on the part of the plaintiff and B, must have proceeded on the ground that A was a joint purchaser with the master, the sale was entirely invalid, and so the ownership of the vessel remained the same at the time of the loss as at the date of the policy *Ibid.*

6. Where an agent here sells goods consigned to him by a partner and agent of a foreign house, an action for the price must be brought either in the names of all the partners, or in that of the agent here, and not in the name of the partner who sent out the goods. *Halliday* v. *Doggett*. 359

PRINCIPAL AND SURETY

See EVIDENCE, 9.
TRUSTEE PROCESS, 5, 6

PROMISE.

Where a subscription to a charitable fund was made after the incorporation of the body who were its trustees, and afterwards a promissory note was given, purporting to be for value received, payable to the same party, and referring expressly to the subscription and the purposes of it as the consideration of the note, and those purposes were in the process of execution, the note was held to be founded on a sufficient consideration and to be binding on the promisor. *Amherst Academy* v. *Cowls*. 427

See FRAUDS, STATUTE OF.

REAL ACTION.

1. Where in a writ of entry the ten

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ant files a claim for improvements, and the demandant claims that the value of the land without the improvements may be found, it is not necessary that a special issue be framed on the possession of the tenant; and if he has not been in possession six years, the jury may find that fact as a reason for not inquiring into the value of the improvements. *Poignard* v. *Smith*. 172

2 In a writ of entry, the want of an averment of seisin in the demandant is cured by a verdict that he was disseised, and he is entitled thereupon to be re-seised of at least an estate of freehold. *Ward* v. *Bartholomew*. 409

RECOGNIZANCE.

Where one, being under a recognizance to keep the peace, committed a breach of the peace, for which he was indicted and fined, it was *held*, that he was nevertheless liable to an action for the penalty of the recognizance. *Commonwealth* v. *Braynard*. 113

RECORD

See ATTORNEY.
FOREIGN JUDGMENT, 2, 3.

REGISTRY OF DEED.

See DEED, 1.

RELEASE.

See PRACTICE, 3.

RELIGIOUS SOCIETY.

See PARISH.

RIVER.

See MILL.

SALE.

1 Where R made a bill of sale to G of all the lumber and materials in a ship-yard for building and finishing a ship, without any schedule or specification of the articles, and without keeping them by themselves, it was *held*, that nothing passed by the conveyance; but taking such instrument in connexion with a former one by which R agreed to build a ship for G, and a subsequent one by which he conveyed to G the keel and other parts of an unfinished ship, then lying on the stocks, it was *held*, that all the timber which was actually selected and fitted for the ship would pass, if it could be identified. *Glover* v. *Hunnewell*. 222

2. A witness called for that purpose, being unable to identify it, except by a schedule made some months after the sale, and even with that having no present recollection as to the articles enumerated, his testimony was rejected. *Ibid.*

3. G having, immediately after he had made the contract with R for the building of the ship, agreed that L should be the owner of one quarter, it was *held*, that L had no property in any of the timber before it was inserted into the ship. *Ibid.*

4. A and B, joint owners of a chattel, sell it on a condition precedent and make a delivery subject to the condition; which not being complied with, and the chattel being attached by a creditor of the vendee, A sells his part to B, who replevies the chattel. *Held*, in such action, that A was disinterested, and so a competent witness. *Smith* v. *Dennie*. 262

5. A voluntary delivery of a chattel sold upon condition, without the delivery's being *sub conditione*, exposes the property to attachment by the creditors of the vendee. *Ibid.*

6. Where a chattel was sold upon condition that the vendee should give an indorsed note, but was

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delivered without any express reference to the condition, and remained in possession of the vendee eight days, when it was attached by his creditors, the vendor having made no claim during that period either for the note or the chattel, and no reason was assigned for omitting such a claim, it was *held*, that there was a waiver of the condition, so far as to warrant the attachment, and that a verdict to the contrary was against the evidence. *Ibid.*

7. The defendant having sold to one G, at a certain price per ton, a large pile of slate, to be paid for as parcels of it should from time to time be taken away, and G having paid the price for 14 tons, it was *held*, that he was entitled to have that quantity weighed off and separated for him, but that until such separation he had no property in any specific 14 tons, and could not maintain trover therefor. *Young* v. *Austin.* 280
8. G, having after such payment sold 14 tons to the plaintiff and given him an order therefor upon the defendants, made a settlement with the defendants before they had notice of the transfer, giving his note for the balance due on his contract, with a memorandum, that when paid, the residue of the slate was to be delivered. After this the plaintiff presented the order, which the defendants refused to accept. It was *held*, that he had no property in the 14 tons of slate. *Ibid.*

See POOR, 3.
PRINCIPAL AND AGENT, 2, 3, 4, 5
SHIP, 3.

SEA SHORE.

See FLATS GROUND

SET-OFF.

See BILL OF EXCHANGE, &c., 3.

SHERIFF.

1. In trespass against an officer for attaching property of the plaintiff in an action against him which was not sustained, it was *held*, that he was not estopped to show that the property belonged to him, although at the time of the attachment he declared it belonged to a stranger, the plaintiff having acquired no advantage and the officer having sustained no damage by such declaration. *Wallis* v. *Truesdell.* 455
2. Where a defendant, whose property had been attached, made an agreement with the plaintiff that the defendant should take the property, and if an adjustment of the suit should not be made, should return it and the plaintiff might then sell or dispose of it as he chose, and apply the proceeds to his claim against the defendant, and the property was delivered to the defendant and returned to the plaintiff and afterwards sold by the officer, by auction, upon the mesne process, the defendant forbidding the sale; it was *held*, that the defendant had a right to revoke the license to sell *Ibid.*
3. Where an officer sells chattels attached on mesne process, without pursuing the provisions of *St.* 1822, *c.* 93, and the defendant prevails in the suit, the officer becomes a trespasser *ab initio*, and is liable to an action without any previous demand on him for the chattels. *Ibid.*
4. In *case* against a sheriff for a *voluntary* escape of a debtor committed on mesne process, the defendant may prove, in mitigation of damages, that the debtor was unable to pay the debt. *Brooks* v. *Hoyt.* 468
5. If an officer, having attached goods of a debtor, suffers them to remain intermingled with other goods of the debtor, and makes claim to the whole, so that another officer, having a writ against the same debtor, cannot distinguish which have been

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attached, the latter officer will be justified in attaching the whole. *Sawyer* v. *Merrill*. 478

6 The *St.* 1783, *c.* 44, § 3, prohibits sheriffs from making or filling up any plaint, declaration, writ, or process, and provides, that "all such acts done by either of them shall be void." A writ and declaration were written by a deputy sheriff, an attachment of land made upon the writ, and the land seasonably set off on an execution issued on a judgment recovered in the suit. Subsequently to the attachment, and previously to the judgment, the debtor conveyed the land to a *bonâ fide* purchaser for a good consideration. It was *held*, that this conveyance defeated the attachment, and that the title of the purchaser was good against the judgment creditor. *Smith* v. *Saxton*. 483

7. It *seems*, that as between the parties the judgment is good. *Ibid.*

See EXECUTION, 1, 2.

SHIP.

1. Where two persons build a ship together, to be owned by them in certain proportions, and one advances more than his proportion of the expenses, he has no lien on the ship for the balance due to him, but the interest of the other in the ship, at least to the extent of his advances, is liable to attachment at the suit of other creditors. *Merrill* v. *Bartlett*. 46

2 Where property was given to two as owners of a ship, it was *held*, that it belonged to them as tenants in common, and not as partners, and that a prior attachment of it by a creditor of one of them, was valid against a subsequent attachment by a joint creditor. *Thorndike* v. *De Wolf & Trs.* 120

3 In November, R, in contracting to build a ship for G, agrees to find all and do all in the carpenter's line, and to launch the ship and deliver her to G in September following, G stipulating to pay for her a certain price per ton in thirty days after the delivery; and in another instrument of the same date, R leases his ship-yard to G, and covenants, as soon as the keel shall be laid, to execute a bill of sale of the ship, before G shall be liable to make advances. G and one L, on the same day, agree that the ship is for their account and risk, and that they will sustain their respective proportions of profit and loss. On the 12th of May following, in consideration of advances made by G and to secure him against loss, R executes to him a conveyance of all the lumber and materials in the yard, and covenants to apply them to the building of the ship; but this instrument is made before the keel is laid. On the 20th of May, the keel being laid and the stem and stern posts raised, R, to secure the performance of the contract of November to build a ship, executes to G a conveyance of "the keel and other parts of an unfinished vessel, being the same vessel contracted to be built by the instrument of November," with a lease of the ship-yard, and makes a symbolical delivery; and the instrument contains a condition, that if G shall neglect to fulfil his part of the contract, the conveyance shall be void, and likewise a covenant by G, that R shall have free ingress into the yard to finish and launch the ship. *Held*, that these contracts were not fraudulent *per se*, nor unlawful; that the contract of May 12th was inoperative as a conveyance of the ship; but that by virtue of the contracts of November and of May 20th, the property in the keel vested in G, subject to the condition mentioned, and drew after it all the subsequent additions; and that an action of tres-

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pass against a sheriff who afterwards attached the ship on the stocks as the property of R, was rightly brought by G and L jointly. *Glover* v. *Austin*. 209

4. Where R made a bill of sale to G of all the lumber and materials in a ship-yard for building and finishing a ship, without any schedule or specification of the articles, and without keeping them by themselves, it was *held*, that nothing passed by the conveyance; but taking such instrument in connexion with a former one by which R agreed to build a ship for G, and a subsequent one by which he conveyed to G the keel and other parts of an unfinished ship, then lying on the stocks, it was *held*, that all the timber which was actually selected and fitted for the ship would pass, if it could be identified. *Glover* v. *Hunnewell*. 222

5 G having immediately after he had made the contract with R for the building of the ship, agreed that L should be the owner of one quarter, it was *held*, that L had no property in any of the timber before it was inserted into the ship. *Ibid.*

See CHARTER-PARTY.
USAGE.

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SURETY.

See EVIDENCE, 9.
TRUSTEE PROCESS, 5, 6.

TAX.

1. Whether a person, being an inhabitant of and resident in this State, is liable to be taxed here for his personal property invested in a mercantile establishment in another State, *quære*. *Osborn* v. *Danvers*

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2 Where one is overrated by assessors, whether by including in the valuation, property of which he is not the owner, or that for which he is not liable to be taxed his only remedy is by an application for an abatement pursuant to the statute. *Ibid.*

See PARISH, 7.

TENANT IN COMMON.

See PARISH, 5, 6.
SHIP, 2.

TENDER.

A witness told the plaintiff that the defendant had left money with him to pay the plaintiff's bill, and that if the plaintiff would make it right, by deducting a certain sum, he would pay it, at the same time making a motion with his hand towards his desk, at which he was then standing; and he swore that he believed, but did not know, that there was money enough in his desk, but if there was not, he would have obtained it in five minutes if the plaintiff would have made the deduction, but the plaintiff replied, that he would deduct nothing. *Held*, that this was not a tender. *Breed* v *Hurd.* 356

See BOND.

TOWN.

A town, which acts also as a parish, may raise money to repair a meetinghouse as a compensation for the use of it for municipal purposes, or to pay a sexton for ringing the bell for town meetings, but such design should appear in the vote; for *primâ facie*, money to repair a meetinghouse, or for the pay of a sexton, is for parochial and not municipal purposes, and cannot be assessed on such inhabitants as are not members of the parish. *Woodbury* v. *Hamilton.* 101

See PARISH, 7.

TRUST.

See PARISH, 3, 4.

TRUSTEE PROCESS.

1. Where one summoned in a process of foreign attachment, disclosed that he had in his hands property, the title to which was in controversy between the principal defendant and a third person, being submitted to referees, and that during the pendency of the process, the referees had awarded in favor of the principal defendant, he was adjudged trustee. *Thorndike* v. *De Wolf & Trs.* 120
2. Where a debtor makes a general assignment of his property in trust for the benefit of his creditors, a creditor, who by a trustee process attaches the funds in the hands of the assignees, will be entitled to payment, in preference to creditors who execute the assignment subsequently to the attachment. *Ward* v. *Lamson & Trs.* 358
3. Where such assignees employed the debtor himself to collect for them the proceeds of certain property included in the assignment, in another State, which he did, and before he paid over the same, the assignees were summoned as his trustees, it was *held*, that they were chargeable as such, the debtor being considered as their servant, and a receipt of the money by him as a receipt by themselves. *Ibid.*
4. Exceptions will not lie to an order of the Court of Common Pleas requiring one summoned as a trustee, to answer a particular interrogatory, such order being merely interlocutory. *Piper* v. *Willard & Tr.* 461
5. Where a surety receives from his principal, property to secure him

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against his liabilities, and the principal subsequently makes a settlement with the surety, in which he transfers to the surety his whole interest in the property for a grossly inadequate consideration, the settlement is fraudulent against creditors of the principal; but the surety is still entitled to hold the property to secure him against his original liabilities. *Ripley* v. *Severance & Tr.* 474

6 If in such case the surety be summoned as trustee of the principal, he will have a right to deduct from the proceeds of the property all payments which he has made on account of his liabilities as surety, and all amounts which he is still liable to pay on that account, and also any other payments *bonâ fide* made by him on account of the principal; and will be chargeable only for the balance after making these deductions. *Ibid.*

7. Where, in such a case, one of the original liabilities was to pay a life annuity to a third person, the Court directed the value of the annuity to be estimated in ready money, and to be deducted from the proceeds in the trustee's hands, and that he should only be chargeable with the balance. *Ibid.*

8. If in such case the parties and all concerned agree, the plaintiff may relieve the trustee from his future liability to pay the annuity. *Ibid.*

9. A person cannot be chargeable as trustee on the trustee process, on account of land which has been conveyed to him by the principal defendant to defraud creditors. *Ibid.*

See BANKRUPT, 2, 3

TURNPIKE ROAD.

See WAY, 3.

USAGE.

A usage for the master of a vessel stranded, to sell the cargo without necessity, is void. *Bryant* v *Commonwealth Ins. Co.* 131

VERDICT.

The jury may be asked by the judge upon what grounds they have returned their verdict, and if by their answer it appears that they have proceeded upon an erroneous principle, the verdict may be set aside. *Pierce* v. *Woodward.* 206

WAY.

1. Wheret he damages occasioned by laying out a road were estimated by a committee, and their report was accepted by the Court of Sessions, but the road was not worked before the *St.* 1825, *c.* 171, took effect, it was *held*, that the commissioners appointed under that statute having determined to construct the road, it was their duty to estimate the damages anew, in order that they might be paid by the county. *Danvers* v. *Commissioners of Highways of Essex.* 20

2. It was *held* also, that by *St.* 1827, *c* 77, (repealing the former statute,) the authority of the commissioners over such road continued until it should be finally and conclusively acted upon by them. *Ibid.*

3. The owner of the soil over which a turnpike road is laid out, may maintain trespass against the servant of the corporation for taking the herbage. *Adams* v. *Emerson.* 57

4. In *St.* 1786, *c* 81, § 7, giving double damages for an injury received through a defect in any highway, the term *highway* includes *townway*. *Jones* v *Andover.* 59

5. The return to the Court of Sessions, of commissioners of highways of their proceedings in laying out a road, need not state what notice was given to towns and persons interested, and if they have ordered a notice in a particular manner, their return need not state that no-

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tice was given in that manner; it is sufficient if it appear from their return that reasonable notice was given. *New Salem, Petitioners, &c.* 470

6. When the parties interested are duly notified of the time and place of a meeting of the commissioners, no new notice to them is necessary of the time and place of an adjourned meeting; of which they are bound to take notice. *Ibid.*

7. Parties who appear before the commissioners cannot object to the proceedings on the ground of their not having had reasonable notice, unless they make the objection at the time of the hearing. *Ibid.*

8. Where the commissioners of highways, on petitions for a new road, ordered a hearing at a certain time and place, and thirty days' notice of the time and place appointed, to be given to the towns through which the road was to run, and the return of the commissioners stated that on the day appointed they proceeded to the business, "having given reasonable notice to the inhabitants of the said towns," one of which towns appeared, and having given "like notice" to certain persons named, being all the persons whom the commissioners knew to be interested in the lands through which the route of the road passed, most of whom also appeared; it was *held*, that the return showed sufficiently that reasonable notice had been given, and the Court refused to grant a *certiorari* on the ground that the notice was insufficient. *Ibid.*

9. The commissioners of highways were authorized to enter into a contract for the making of a road, before making their return to the Court of Sessions. *Ibid.*

10. The commissioners of highways were authorized to make such a contract through the agency of the chairman. *Ibid.*

11. Where an application was made to the Supreme Court to grant a *mandamus* to certain commissioners of highways appointed under the statute of 1825, *c.*171, which created the office, in order to compel them to construct and finish a certain road which had been commenced under the authority of the Court of Sessions, and the Court granted a *mandamus* in the alternative, ordering them either to construct the road or show cause to the contrary, and the commissioners appeared and made a return setting forth their reasons for not constructing the road, and the plaintiffs moved that the return be quashed for insufficiency and a peremptory *mandamus* be issued; and pending this motion the *St.* 1825, *c.* 171, was repealed by *St.* 1827, *c.* 77, and all the powers of the commissioners of highways vested in county commissioners; it was *held*, that all the power of the commissioners of highways to act in the business was destroyed by the repealing statute, and the *mandamus* was refused. *Springfield* v. *Hampden Commissioners of Highways.* 501

12. In such a case judgment for a *mandamus* will not be entered up as of a term preceding the passage of the repealing act. *Ibid.*

WITNESS.

See EVIDENCE, 7, 9.

END OF THE SIXTH VOLUME.

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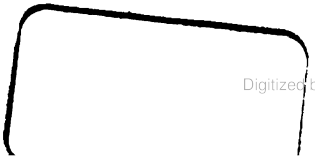

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